1989

Harry Thorsen v. Markay Johnson : Reply Brief

Utah Court of Appeals

Ken Chamberlain; Olsen, Mciff and Chamberlain; Attorneys for Respondents.
Frederick A. Jackman; Attorney for Appellant.

IN THE SUPREME COURT OF THE STATE OF UTAH

HARRY THORSEN,

Plaintiff,

v.

MARKAY JOHNSON, et al.,

Defendants.

REPLY BRIEF

CASE NO. 880402

Category No. 14b

GOOSEBERRY ESTATES, et al.,

Plaintiffs-Respondents,

v.

HARRY THORSEN and DONALD GATES,

Defendants-Appellants.

89-0411-CA

REPLY BRIEF

Frederick A. Jackman, #1632
1327 South 800 East
Suite 300
Orem, Utah 84058
Telephone: (801) 225-1632

ATTORNEY FOR APPELLANT THORSEN

Ken Chamberlain, #0608
OLSEN, MCIFF & CHAMBERLAIN
225 North 100 East
P.O. Box 100
Richfield, Utah 84701
(801) 896-4461

ATTORNEYS FOR RESPONDENTS

IN THE SUPREME COURT OF THE STATE OF UTAH

HARRY THORSEN,

Plaintiff,

v.

MARKAY JOHNSON, et al.,

Defendants.

REPLY BRIEF

CASE NO. 880402

Category No. 14b

GOOSEBERRY ESTATES, et al.,

Plaintiffs-Respondents,

v.

HARRY THORSEN and DONALD GATES,

Defendants-Appellants.

REPLY BRIEF

Frederick A. Jackman, #1632
1327 South 800 East
Suite 300
Orem, Utah 84058
Telephone: (801) 225-1632

ATTORNEY FOR APPELLANT THORSEN

Ken Chamberlain, #0608
OLSEN, MCIFF & CHAMBERLAIN
225 North 100 East
P.O. Box 100
Richfield, Utah 84701
(801) 896-4461

ATTORNEYS FOR RESPONDENTS

LIST OF PARTIES

PLAINTIFF
Harry Thorsen

DEFENDANTS
Markay Johnson and Bryce Johnson, individually, and Markay Johnson and Bryce Johnson, dba Gooseberry Estates, a partnership

---

PLAINTIFFS-RESPONDENTS
Gooseberry Estates, a partnership consisting of TOKACO Enterprises, (a family partnership consisting of William T. Gardner and his children, William Todd Gardner, Kari Ann Gardner and Corrinna Gardner) and LATIGO, INC., a corporation, Tell W. Gardner, Bryce Johnson, Markay Johnson, and Leonard V. Elfervig, all doing business as Gooseberry Estates, a Utah partnership

DEFENDANTS-APPELLANT
Harry Thorsen and Donald Gates

TABLE OF CONTENTS

REPLY BRIEF OF APPELLANT

AUTHORITIES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

HARRY THORSEN,

Plaintiff,

v.

MARKAY JOHNSON, et al.,

Defendants.

REPLY BRIEF

CASE NO. 880402

Category No. 14b

GOOSEBERRY ESTATES, et al.,

Plaintiffs-Respondents,

v.

HARRY THORSEN and DONALD GATES,

Defendants-Appellants.

INTRODUCTION

Thorsen had the right to maintain his easement in its historical size and condition. Thus, a critical issue which must be resolved prior to a measure of damages, if any are owed to respondents (hereinafter referred to as Gooseberry), is a determination of the size and extent of the easement which existed prior to any damage to Gooseberry's property. The damage suffered by the respondents is limited to the impact on the property resulting from the enlargement of the easement as

opposed to the original easement itself.

The size or capacity of the original easement was never addressed by Gooseberry at trial, in their motion to reassess damages, or in their brief which is submitted for purposes of this appeal.

This Court, however, in Thorsen I stated:

> Esplin's appraisal was also flawed because it was based on his assumption that no one had a lawful irrigation ditch easement through the "lots." This was erroneous. As previously mentioned, at oral argument of this case before this Court, counsel for Gooseberry Estates admitted that the trial court did not find an abandonment and that Thorsen had an easement for the irrigation ditch.

Thorsen v. Johnson, 745 P 2d 1243, 1246 (Utah 1947) (attached as Addendum "E").

The evidence presented at trial is abundant in demonstrating both the existence of the easement and the historical size of the lower "B" ditch. This sets the point for comparison and upon comparison it becomes evident that Gooseberry suffered minor damage at best.

POINT I

BEFORE ANY APPROPRIATE AMOUNT OF DAMAGE CAN BE DETERMINED THE SIZE AND EXTENT OF THE ORIGINAL EASEMENT ACROSS GOOSEBERRY'S PROPERTY IN FAVOR OF THORSEN MUST BE ASCERTAINED.

The Iowa Supreme Court in Nixon v. Welch, 24 NW 2d 146 (Iowa, 1946) (attached as Addendum "A") rendered a decision which is widely accepted and often quoted as authority for the extent

of easements relating specifically to the rights and duties of owners of water rights.

The Court discussed the rights a dominant estate has to enter upon the servient estate to maintain and clean a waterway easement such as a ditch. In quoting from Roberts v. Roberts, 55 NY 275, the Court stated:

> If the ditch got out of repair by reason of floods or washing away its banks or otherwise, it was the legal right of the plaintiff to repair it so as to restore it to its original condition and make it subserve the purpose which it originally effected, of carrying off water of the stream. He was entitled to have the ditch kept up as it was when he purchased, and to keep it in that condition, and if necessary, to enter upon the defendant's lands to make repairs, doing no unnecessary injury. (Emphasis added)

Nixon at 1145.

The Utah Supreme Court in Holm v. Davis, 125 P 403 (Utah, 1912) (attached as Addendum "B") quotes from Jones on easements:

> The owner of a dominant estate having an easement has a right to enter upon the servient estate and make repairs necessary for the reasonable and convenient use of the easement, doing no unnecessary injury to the servient estate.

The Court in Nixon also stated:

> To illustrate: "A person having an easement in a ditch running through the land of another may go upon the servient land and use so much thereof on either side of the ditch as may be required to make all necessary repairs and to clean out the ditch at all reasonable times; he is liable only for the abuse of this right. It has also been held that the right of access is not limited to purposes of repairs, but may

> be exercised to make original constructions necessary for the enjoyment of the easement.

Nixon at 1146.

The standard applied pursuant to the authority cited supra, is that the size of the easement granted to Thorsen should be sufficient "to subserve the purpose which it originally effected of carrying off the water of the stream".

Harry Thorsen was secretary and treasurer of Gooseberry Creek Irrigation Company at the time of the cleaning of the ditch and had held the position of secretary/treasurer for some 15 to 20 years prior to the cleaning of the ditch. (Transcript page 455). Gooseberry Creek Irrigation Company is entitled, according to the Cox Decree, to a maximum of 26 and 45/100 second feet of water and is entitled to a minimum of 17 second feet out of Gooseberry Creek (Transcript page 458). The Gooseberry Creek irrigation system is divided into an "A" ditch section, a "B" ditch section and a "C" ditch section. (Transcript page 458). At those times of the year when the flow of the river is at its maximum the water is split evenly to each of the three sections, thus, one-third of the 26 and 45/100 second feet, or eight to nine second feet of water, would be sent down the "B" ditch section. (Transcript Page 459). At the time of the cleaning of the ditch which Gooseberry asserts increased the size of the easement and thereby gave rise to these proceedings, the "B"

ditch section came down a single ditch and at a point was diverted between what has been referred to as the upper "B" ditch or the "B" ditch extension and the lower "B" ditch which is the ditch of concern in this litigation.

POINT II

THE TESTIMONY AT TRIAL ESTABLISHES THE HISTORICAL CAPACITY AND DIMENSIONS OF THE LOWER "B" DITCH AS HAVING AND CARRYING CAPACITY OF SEVEN TO TEN SECOND FEET OF WATER AND BEING THREE FEET WIDE.

Allen K. Nielson. Allen K. Nielson, a consulting engineer for which Gooseberry stipulated was a licensed engineer and an expert witness in the field testified:

> Q: Allen, have you had occasion to inspect the soil conservation records concerning what has been referred to in this litigation as the lower "B" ditch on the Johnson property at Gooseberry?
>
> A: Yes, I have.
>
> Q: When did you do that?
>
> A: This morning.
>
> Q: And what did those records show with regard to the history of the lower -- what we call the lower ditch?
>
> A: Well, it shows that originally being the Gooseberry water user's canal and, as far as the record showed, it has never been abandoned.

(Transcript page 450).

Ted Bird. Ted Bird's family owned the property which is currently owned by Gooseberry Estates. The Birds resided on the

Gooseberry property until 1937 at which time Ted Bird's family sold the property. Mr. Bird was born in 1911. He recalls going to the lower "B" ditch as a boy and also Mr. Bird testified that from 1930 until 1937 he had the duty of irrigating the Gooseberry property.

When asked about the size and capacity of the ditch prior to the time they sold the property in 1937, Ted Bird testified:

> Q: How wide?
>
> A: Well, I would say that it was right around three foot wide, but that at that time it wasn't too deep.
>
> Q: How deep?
>
> A: Well, I would say it wasn't over one foot. I use to take a little dipper to get a gallon, to dip it out, to get a gallon of water.
>
> Q: O.k.
>
> A: And that went along as long as until the folks moved away from Gooseberry.
>
> Q: Now, how much water would you --- up to the time your folks moved away, how much water would you put down the lower "B" ditch.
>
> A: We put it all.
>
> Q: And what do you mean by "all".
>
> A: Well, we put all of Gooseberry Creek.
>
> . . .
>
> A: Well, I think in the Spring of the year you could turn ten feet of water in there.

(Transcript, page 548).

Harry Thorsen. In 1944, Harry Thorsen acquired the property which he currently owns and which was irrigated by the lower "B" ditch. (Transcript, page 456). At the time Mr. Thorsen acquired the property he purchased 14 shares of water in the lower "B" ditch and five shares of water in the upper "B" ditch. (Transcript, page 457).

As to the amount of water which was sent down the lower "B" ditch historically, Harry Thorsen testified:

> Q: Assuming that a normal average year, what would be the most water you could take down the lower "B" ditch in the high season.
>
> A: In the high season?
>
> Q: Yes.
>
> A: Well, in the earlier days, we would take out six or seven feet down there. (Transcript, page 461).

Mr. Thorsen testified that from the year he purchased the property up until 1978 when the property was leased to Clayton Crane, the lower "B" ditch was used every year:

> Q: From 1944 to 1978 when you leased the property to Clayton Crane, was there any year that you didn't use the lower "B" ditch.
>
> A: Oh, no. We always used it. (Transcript, page 462).

Eric Allen Thorsen. Allen Thorsen is the son of Harry Thorsen who testified that prior to his graduation from high school in 1959, that he assisted his father on the ranch and

recalled several of the structures, including the flume in the ditch and also recalls helping his father take water down the lower "B" ditch. (Transcript, pages 502 to 504).

In 1967, Allen Thorsen moved back to the ranch and assisted his father in the actual ranching and irrigation of the property full time until 1972. Since 1972, Allen Thorsen has been on the property on several occasions. He testified that there was water in the ditch each year between 1967 and 1972 and even beyond that time when he was on the property. (Transcript, page 504).

When questioned about the historical dimension of the ditch, Allen Thorsen testified as follows:

> Q: How would you describe the ditch back in those early years with respect to size and its appearance?
>
> A: I would say three feet wide and at least a couple of feet deep on an average. (Transcript, page 504).

Bob Robbins. Bob Robbins was an individual who leased the Gooseberry property on which the lower "B" ditch and the easement is located during the years 1974 through 1978.

> Q: Did you see water running through that ditch?
>
> A: Yes.
>
> Q: All the way?
>
> A: Yes.
>
> Q: To the Thorsen property?
>
> A: Yes.

. . .

A: . . . I made a shutter out of one solid piece of metal with a handle on it, and when I put that down in front of that pipe, I took the whole creek, all the water.

Q: Down the lower "B" ditch?

A: Down the lower "B" ditch?

Q: And how much would that be? . . .

A: I'm sure we would have to have over ten feet. . .

Transcript, pages 515 - 517.

Clayton Crane. Clayton Crane was the individual who leased the Thorsen property subsequent to 1978. Clayton testified that he used the ditch in the Spring of 1978 and water was brought to the Thorsen property through the lower "B" ditch in 1978. (Transcript, page 422). He said that due to the forces of nature it was so difficult to bring the ditch down the lower "B" ditch that the ditch would need to be cleaned prior to further use. (Transcript, page 423).

POINT III

THE IMPROVEMENTS LOCATED IN THE DITCH ITSELF EVIDENCE THE HISTORICAL CARRYING CAPACITY OF THE DITCH AS SEVEN TO TEN SECOND FEET AND THE WIDTH AS THREE FEET.

Two engineers testified on behalf of Thorsen relating to the improvements located in the lower "B" ditch and the amount of water which could be carried through each of the structures.

Paul Landell testified that structure number one would carry 11.6 cubic feet per second, structure number two would carry ten cubic feet per second and that structure three would carry 7.1 cubic feet per second. (Transcript, pages 390 to 391).

Allen Nelson, who Gooseberry stipulated was a licensed engineer and an expert witness, testified that he also measured the first two structures in the lower "B" ditch and testified that the carrying capacity of both structures exceeded 11 cubic feet per second. (Transcript, pages 451 to 452).

The testimony given at trial establishes that the historical carrying capacity of the ditch was between seven to ten cubic feet of water. As it relates to the actual dimensions of the ditch itself, the testimony is consistent that the ditch itself encompassed at least three feet in width.

POINT IV

THORSEN HAS USED EQUIPMENT ON THE DITCH TO MAINTAIN AND REPAIR IT ON AN ALMOST ANNUAL BASIS AND IN DOING SO HAS MAINTAINED THE DITCH WITH DIMENSIONS OF MORE THAN THREE FEET IN WIDTH AND TWO AND ONE-HALF FEET IN DEPTH.

Harry Thorsen, Allen Thorsen, and Ted Bird, all testified that on almost an annual basis, both the south and north end of the lower "B" ditch were cleaned and maintained by the use of a piece of equipment called a "V".

> A: . . . We've got two "V", one is a big one and one is a little one.

Q: Would you describe each of them?

A: Yes. I measured them here the other day because we've still got those ditchers and the large one is 67" wide and six feet long. The smaller one is 41" wide and it is six feet long and we would put these on a tractor and drag them behind a tractor. Usually it would take several passes.

Well, we would use the ditchers where the ditch silted up and the two places that would give us any problem would be the upper part and lower part of the ditch. That is where the silt seemed to go. We would get a flood down Coal Canyon or somewhere and we would find the ditch was filling up and would have to work on it a little and we would make several passes, and, when we would go up there, why we'd have this case 530 and put the big ditcher on that tractor and then we'd go through it and stand the ditcher right up on its nose, and go through and start, and then we'd make two or three passes, and we would lower the ditcher down and widen the ditch out with the ditcher on each sequential pass that we would make.

Q: And what depth and width would you get in that process?

A: I would say we would go <u>at least two and one-half feet and maybe better than three feet wide</u>. (Emphasis added).

Q: And how far to the side would you throw dirt?

A: I don't know, it's hard to say. Maybe a couple feet, three feet maybe.

Transcript, Pages 506 and 507. (See also Transcript page 467 and also Transcript page 554).

The purpose for which the easement was originally established was for the carrying of water with a maximum of seven to ten cubic feet per second and that historically the dimensions

of the ditch were three feet wide and one to two and one-half feet deep.

The Utah Supreme Court in Holm v. Davis, 125 P 403 (Utah 1912), dealt with an easement by which water was taken to the Davis property through a ditch over Holm's property. Like the case at hand, the easement in Holm v. Davis was established long before Holm and Davis acquired their property rights. The Utah Supreme Court in Holm stated:

> The fact, therefore, that the canal was on the land and was being used for the purposes aforesaid was notice to the respondent that it was a structure of a permanent character used for purposes permanent in their nature, and hence he purchased the land subject to the rights of the owner of the canal. If the right to use the same, therefore, had ripened into a prescriptive right by the lapse of time and the character of its use, respondent purchased and holds the land subject to appellant's right to maintain and use the canal for the purposes for which it was constructed, maintained and used from its inception. (Emphasis added).

Holm at page 406.

The Utah Supreme Court went on to say:

> . . . We are of the opinion, that, although a canal, ditch or flume may have been constructed by a person on or over lands owned by another with the consent or permission of each such other owner, yet if the owner of the canal, ditch, or flume, or his assignee, has used and maintained the same in the same manner as if they same were constructed over his own lands, and where such use and maintenance has continued uninterruptedly, and under a claim of right for more than twenty years, in such event, the owner of the ditch has acquired a right to use and maintain the same perpetually as an easement.

Holm at 406 to 407.

POINT V

THE COURT MAY TAKE JUDICIAL NOTICE THAT AS AN INCIDENT TO THE REASONABLE ENJOYMENT OF AN EASEMENT IN A DITCH THAT THERE IS ASSUMED A SUFFICIENT DISTANCE ON EACH SIDE OF THE DITCH FOR BANKS AND FURTHER, THAT AN ADEQUATE DISTANCE IS ALLOWED FOR ACCESS AND MAINTENANCE BEYOND THE THREE FOOT WIDTH.

The United States District Court for the District of Utah, Northern Division, in United States v. 3.08 Acres of Land, Etc., 209 F. Supp. 652 (Utah, N.D. 1962) (attached as Addendum "C"), resolved a dispute between the United States of America and Utah Power & Light Company over certain property rights and easement rights relating to the Willard Canal, Weber Basin project, Utah. The Court determined that in order for one to enjoy the full and proper rights granted under an easement that an easement for a canal or a ditch would also include banks along the side of the water way and access for purposes of maintenance:

> I think it is a matter of common knowledge of which the court may take judicial notice that canals in addition to bottoms and sides frequently, if not invariably, have banks. It is reasonable to suppose that the legislature in making provision for reservation of rights of way for canals contemplated that easements so reserved would be for the purpose of constructing and maintaining banks of canals among other things. In this mountainous region where hydrolic gradient must be maintained over irregular terrain it may not be supposed that the maintenance of canals without banks necessarily was contemplated. On the contrary, not only may banks of some sort be deemed reasonably necessary to the enjoyment of the

> easement reserved in favor of the government, but we must accept them as within the contemplation of the statutes reserving the easement.

U.S. at 657.

The Supreme Court of Montana stated in Laden et al. v. Atkeson, 116 P 2d 881 (Mont. 1941) (attached as Addendum "D") that as part of an easement there also exists a secondary easement which allows one sufficient area on each side of a ditch or waterway to establish access to the waterway and to maintain the easement:

> The right to enter upon the servant tenement for the purpose of repairing or renewing an artificial structure, constituting an easement, is called a "secondary easement". A mere incident of the easement that passes by express or implied grant, or is acquired by prescription. 2 Thompson on Real Property, page 343; 19 C.J. Section 208, page 970; 26 Cal. Jar. Page 163 and Jones on Easements Section 811 and 812, pages 653, 654. To illustrate: "A person having an easement in a ditch running through the land of another may go upon the servient land and use so much thereof on either side of the ditch as may be required to make all necessary repairs and to clean out the ditch at all reasonable times. (Emphasis added). 17 Am. Jur. Section 108, page 1004; Dahlberg v. Lannen, supra, Felsental v. Warring, 40 Cal. App. 119, 180, page 67. (Emphasis added).

Laden at page 883.

POINT VI

IT WAS REASONABLE FOR THORSENS TO EMPLOY THE USE OF A BACK HOE TO MAINTAIN THE LOWER "B" DITCH.

The trial court found that at most Thorsen had the right to

run a plow across the Gooseberry property or to hand clean the ditch.

The fact that the easement was originally hand dug does not preclude the use of modern equipment for the maintenance and repair but on the contrary, it is contemplated that as a incident to the easement itself, that modern technology will assist in the maintenance and repair of ditches and that said equipment would be so employed.

Beginning in the year 1957, back hoes were implemented as the primary equipment used for the repair and maintenance of the "A", "B", and "C" ditches in the Gooseberry irrigation system.

The United States District Court in United States v. 3.08 Acres of Land, Etc., cited as supra, held:

> The preponderance of the evidence, however, indicates, and I find, that upon the basis of equipment in existence, the only practical way that the canal can be cleaned at present, and certainly the normal and reasonable means under current conditions, is to utilize a 50 foot boom with drag line, the banks of the canal at the water line being some 70 to 90 feet apart, and at being impracticable because of the construction of the canal and the necessity of maintaining water in it almost all the time to move equipment into the bottom.
>
> . . .
>
> It must be acknowledged that at the time of the original reservation, such equipment as a 50 foot boom and drag line for purposes of cleaning canals was not a usual thing, and may not have even been in use at all. Such an operation was not one that could be deemed uncontemplated in principle. As a

> matter of fact, a 100 foot canal probably was not ordinary construction in those days.
> . . .
>
> The right reasonably to maintain such a canal, including the right to operate the 50 foot boom, if reasonably necessary under existing conditions, must be considered to be included in the reserved easement. The general rule is that while an easement holder may not increase a servitude upon the grantor's property by enlarging on the easement itself, it is entitled to do what is reasonably necessary for full and proper enjoyment of the rights granted under the easement in the normal development of the use of the dominant tenement. (Citations omitted). (Emphasis added).

United States at 658 to 659.

POINT VII

THE DIFFERENCE BETWEEN THE SIZE AND CAPACITY OF THE LOWER "B" DITCH AFTER THE REPAIR AND THE SIZE AND THE CAPACITY OF THE EASEMENT HISTORICALLY IS AT BEST MINIMAL.

Tim Jones was called as an expert by respondents Gooseberry Estates. Gooseberry established his qualifications as having a Master's Degree in civil engineering from Brigham Young Engineering and specializes in municipal water, sewer, irrigation, and other water related engineering. (Transcript, page 187). In response to the specific question from counsel for Gooseberry Estates as to the capacity of the newly repaired ditch, he testified:

> Answer: Well, again, if I may, you have flat sections of it that would be limited and eventually will silt in and you won't have very much capacity and then you have the steeper, in the steep sections, that you could perceive would carry ten second feet

of water quite easily and in the flat section where it silts in - - (Emphasis added).

Question: You could clean those out and still carry it wouldn't you?

Answer: Yes, I mean, that would be a maintenance thing.

Transcript, page 212.

Paul E. Landell, who was also called as an expert at trial, testified that he walked the length of the excavation on the lower "B" ditch (Transcript, page 395) and offered testimony at trial as to the contours of the property and the size of the ditch after the repair and maintenance took place:

Q: What did you observe concerning the nature of the back hoe work on the ditch?

A: Well, one of the things that impressed me is that it must have been -- it's a very difficult area to work because there is a considerable amount of cross flow and it was under those circumstances, it was very difficult to operate a piece of equipment. A back hoe would be virtually the logical piece of equipment to use on that, when they started the work. The upstream of the gate on the north end of the Johnson property, there were indications of -- well, there was a ditch which had not been excavated and shortly they got into the excavated area which came all the way to about the edge of the wooded area, going in a southerly direction and the ditch itself, where it ran through there, that I walked through, was of not a continuous straight gradient, it was inground, which is rather difficult to work with, but, as I said, it's got a lot of erratic, a lot of boulders in it, and it had an average capacity of, I would say, or an average end area, which would be useful for carrying water. And now, this is not consistent through the whole thing, but I would say an average of about three feet in width by one and

> one-half feet in depth. (Emphasis added). (Transcript, page 396 - 397).

Historically, the ditch had a width of three feet or more and a depth of between one foot and two and one-half feet. The excavation the respondents claim damaged them was, in actuality, consistent with the historical size of the ditch.

POINT VIII

ON REASSESSMENT OF DAMAGES THE COURT MUST RULE IN LIGHT OF THE ENTIRE RECORD BEFORE IT.

Counsel for Gooseberry argues in their responsive brief that the Affidavits of Bruce D. Whitehead and Ken Esplin were uncontradicted on the Motion for Reassessment of Damages. On the contrary, the trial court must make its decision based upon the entire record which includes not only the testimony offered at trial and the affidavits but the instructions contained in the opinion from this Court.

Ken Esplin's Affidavit cannot be the sole basis for measuring damages because several contradictory opinions remain unreconciled in the lower court's holding on reassessment of damages. This Court stated on the first appeal:

> Esplin's appraisal was also flawed because it was based on his assumption that no one had a lawful irrigation ditch easement through the lots. This was erroneous.

Thorsen v. Johnson, 745 P 2d 1243, 1246 (Utah 1947) (attached as Addendum "E").

The Affidavit submitted by Ken Esplin on reassessment of damages and considered at length in respondent's brief again fails to address the issue of the size of the existing easement nor does it consider what effect the historical size of easement would have on the measure of damages. The trial court also neglects to make any findings or address the impact the extent of the existing easement would have on determining the damages awarded by the Court.

All of the record must be considered on reassessment of damages.

At trial, Ken Esplin testified that there were ten lots which were damaged, by 50% of their value. The trial court accepted the opinion of Ken Esplin at the time of trial with the exception that the court specifically found nine lots damaged as opposed to ten. The Affidavits of Bruce Whitehead and Ken Esplin do not offer additional information which would warrant expanding the damage beyond the nine lots previously found by the Court. To expand the damages outside the nine lots, the Court would have to use Ken Esplin's Affidavit to impeach Esplin's own testimony at trial.

Further, at trial, Ken Esplin testified that the diminution in market value of the ten lots to which he assigned some degree of damage was a decrease of 50% of their value. In Ken Esplin's

Affidavit on reassessment of damages, he testifies that the diminution of value is the difference between $1,250.00 as the proposed value of the property and that the only other use is for grazing purposes valued at $100.00 per acre. No explanation is ever given or reconciliation made why 50% diminution in value as previously testified to should now be changed to nearly a 100% diminution.

The Court's determination that damage existed outside of the nine lots previously found by the same Court to be damaged is wholly without foundation in the evidence presented to the Court by either the Affidavits or otherwise.

CONCLUSION

This Court determined on the first appeal that an easement existed in favor of Thorsen for a ditch across the Gooseberry property. In measuring the damages one must initially make a determination of the nature and extent of that property right since Thorsen is liable only for exceeding his property right in the easement.

The proper determination of the size and extent of the easement is not the size of the easement after the forces of nature have obstructed and inhibited the water way, but rather, the size of the easement should be determined in light of the purposes for which the easement was originally established. The

record abundantly sets out the size and capacity of the ditch for the period of 1930 through the time of the cleaning of the ditch as seven to ten second feet and three feet wide. Thorsen is only liable for damages created because he abused or exceeded his property right.

The damage in this case might be a combination of the amount of property, if any, taken by the enlarged easement or specific and the aesthetic effect, if any, the enlarged easement has on the value of the property. This Court was correct in directing the assessment of damages only based on the property actually taken since the difference between the historical capacity and size of the ditch and the capacity and size of the repaired ditch is so small that it does not have much visual impact, if any.

In other words, the issue is not the measure of damages resulting from the existence of the ditch itself on the Gooseberry property, since that right always existed, but rather, the appropriate measure is for only that portion of the excavation which exceeded Thorsen's lawful property interest.

As one reviews the testimony and evidence presented, it is evident that Thorsen did not greatly exceed his right to repair and maintain the lower "B" ditch and therefore, appellant respectfully requests this Court to reverse the decision of the trial court and direct the award of minimal damages, if any, to

respondent.

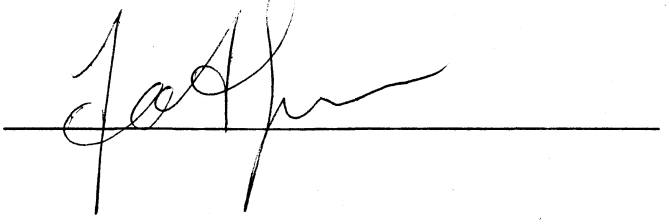
DATED this 26th day of May, 1989.

FREDERICK A. JACKMAN
Attorney for Appellant

MAILING CERTIFICATE

I hereby certify that on the 30th day of May, 1989, I mailed a true and correct copy of the foregoing to the following, postage prepaid.

Mr. Ken Chamberlain
Attorney for Respondent
225 North 100 East
P.O. Box 100
Richfield, Utah 84701



ADDENDUM "A"

CHESTER A. NIXON et al., Appts.,

v.

VERNA R. WELCH et al

Iowa Supreme Court — October 15, 1946
(— Iowa —, 169 ALR 1141, 24 NW2d 476)

Easements, § 54 — repair — artificial drainage ditch.

1. The owner of the servient estate over whose land an easement exists in a watercourse, in favor of the owner of the dominant estate, must permit cleaning out of the watercourse across his land.

[*See annotation on this question beginning on page* 1147.]

Easements, § 54 — repair — artificial drainage ditch — duty of dominant owner — cost.

2. The owner of an easement in an artificial drainage ditch across land of another for the discharge of surface waters from his dominant land, if the only party benefited thereby, has the duty of keeping the easement in repair and must bear the entire cost of cleaning out and reopening the ditch when it becomes filled in by natural causes.

[*See annotation on this question beginning on page* 1147.]

Waters, §§ 60, 61 — surface waters — drainage of — establishment of drainage district.

3. An owner of land within an established drainage district who can show that a part of his land is not in fact drained by the established ditch, but constitutes a dominant tract drained by another natural or long-established artificial watercourse across servient land of another, is entitled to all the rights of a dominant holder as against the servient holder, the same as if his land was not within the drainage district.

[See Am Jur "Drains and Sewers," § 61.]

Waters, § 74 — prescriptive rights — drainage of surface waters.

4. The existence in favor of a landowner of an easement for drainage of surface waters across lands of another through an artificial ditch used for that purpose for many years, and his right to have the ditch cleaned out and restored, do not depend upon the legal establishment of the drainage ditch but may rest upon prescription.

[See Am Jur "Easements," § 85.]

Waters, § 74 — drainage of surface waters — prescriptive right.

5. An easement for the flow of surface waters across the lands of another exists by prescription where it appears that an artificial drainage ditch across the servient land had been openly used for more than forty years, under claim of right, to convey surface waters from the dominant estate across the servient estate to an outlet to a lake.

[See Am Jur "Easements," § 85.]

Waters, § 60 — surface waters — drainage — blocking of.

6. An easement existing in favor of a dominant estate for the flow of surface waters across a road and thence across lands of another may not be blocked up either by the highway authorities or by the owner of the servient land.

Highways, § 13 — defects in highways — blocking surface drainage — construction of culvert — cost of.

7. When county highway authorities, in grading a highway, remove a culvert through which surface waters from abutting land drained into an artificial watercourse across servient land on the opposite side of the highway, the cost of restoring the culvert to permit free flowage of surface waters from the dominant lands into the drainage ditch must be borne by the county.

[See Am Jur "Easements," § 108.]

APPEAL by plaintiff from an adverse decree of the District Court, Harrison County, in an action for a mandatory injunction to require defendant Board of Supervisors to restore a culvert, and defendant landowners to permit a drainage ditch to be cleaned out and maintained, as an outlet for discharge of surface waters from plaintiff's land. *Decree reversed and cause remanded.*

Roy E. Havens, of Logan, and **De Vere Watson**, of Council Bluffs, for appellants:

Where a drainage ditch has been constructed with the knowledge and consent of the owner of the land through which it runs and has been maintained for more than ten years without objection on the part of the original owner or his grantees an easement and enforceable right therein is acquired. Ehler v. Stier, 205 Iowa 673, 216 NW 637; Hatton v. Cale, 152 Iowa 485, 132 NW 1101; Pascal v. Hynes, 170 Iowa 121, 152 NW 26; Schwartz v. Wapello County, 208 Iowa 1229, 227 NW 91; Jacobson v. Camden, — Iowa —, 20 NW2d 407.

The statutes of Iowa impose a duty upon officers having charge of highways to maintain openings therein to permit surface water to escape in its natural and established course to servient lands, and performance of that duty may be compelled by the courts. Pate v. Rogers, 193 Iowa 726, 187 NW 451; Jacobson v. Camden, — Iowa —, 20 NW2d 470.

As to whether or not they will perform such mandatory ministerial duty they have no legal discretion. 34 Am Jur, Mandamus, p 859, § 70; p 862, § 72; p 969, § 197; Pierce v. Green, 229 Iowa 22, 294 NW 237, 131 ALR 335; Bredt v. Franklin County, 227 Iowa 1230, 290 NW 669.

Welch & Welch and **William P. Welch**, all of Logan, for Verna R. Welch and William P. Welch.

Wright & Kistle, of Council Bluffs, for trustees of the estate of G. M. Dodge, deceased.

Harold E. Hanson, of Logan, for *William Walters, K. L. Brundige*, and J. C. Hammitt, County Supervisors of Harrison County, Iowa.

Mulroney, J.

Sections 23 and 24 in Cincinnati Township in Harrison County are separated by a north and south county road. Plaintiffs, Nixon and Bierring, own land along the east side of the road in section 24 and the defendant, Verna Welch, owns land along the west side of the road in section 23. Plaintiffs sued Verna Welch and her husband and the board of supervisors alleging that the surface water drained south across the west part of the Nixon land onto the Bierring land and thence, until the year 1940, westerly through a culvert under the road onto the Welch land and through an open ditch extending in a southwesterly direction across the Welch land to a lake along the west side of the Welch land. The petition alleged that in 1940 the board had caused *the road to be graded and the culvert* removed and that the ditch across the Welch land had become filled with soil; that the culvert and the ditch across the Welch land were all a part of an established drainage system known as the Bowman ditch established in 1878 by the joint action of the owners of the land in sections 23 and 24 and the owners of other lands lying to the north of Nixon's land. The petition claimed an easement in favor of plaintiffs for the flow of surface water across the highway and across the Welch land, and the right to have the culvert restored and the ditch across the Welch land cleaned out and maintained as an outlet. The petition alleged damages by reason of the damming up of the surface water and the prayer was for a mandatory injunction to compel the board to restore the culvert and to *require the defendant Verna Welch* to permit the ditch across her land to be cleaned out and maintained as an outlet for the surface water flowing from plaintiffs' land and for general equitable relief.

The portions of Verna Welch's answer that are responsive to the claims of plaintiffs deny that the Bowman ditch was ever "constructed under proceedings of the Board of

Supervisors of Harrison County" and assert the records merely show a proposal for a ditch that was abandoned and never maintained; that there never has been any drainage, natural or artificial of the surface water from plaintiffs' land across the road and across the Welch land and that plaintiffs' land is in fact lower than the Welch land. The board of supervisors adopted the Welch answer and further alleged their predecessors in office exercised a sound discretion in not constructing the culvert. The defendants, trustees of the Estate of G. M. Dodge, are the holders of a mortgage on the Welch land and their counsel stated in open court they would abide by any decree without pleading.

The trial court heard much evidence of witnesses who had been familiar with this land for many years. Some of them had known the land for more than half a century, some for forty years and others for somewhat lesser periods of time. It was all to the effect that a swale extended from the northern boundary of Nixon's land in a southwestern direction to the old culvert site near the southwestern corner of the Bierring land and thence across the Welch land to the lake; that this swale was the watercourse that drained the Nixon and Bierring land, though it perhaps did operate with decreasing efficiency as the years went on and the ditch gradually filled in. The records with respect to the old Bowman ditch were introduced and this swale followed the course of that ditch. The testimony of the witnesses was well supported by photographs showing the line of the depression, and by the county engineer. There was some testimony that at the time of trial some of the water pockets on the Nixon land would, in times of heavy rainfall, drain north into a road ditch along paved highway 30 which runs along the north side of the Nixon land, but the evidence did establish that the natural drainage of the west part of section 24 was in a southwesterly direction and that the Welch land was slightly lower than the plaintiffs' land. The record with respect to the Bowman ditch shows proceedings commencing in 1877 when the respective owners of the land petitioned the board for its establishment; the letting of the contract, and the assessments to pay for its construction. One witness, William Sproul, who had been familiar with this land since 1897, testified that he helped clean out the Bowman ditch in 1903 or 1904 and he stated: "The Township Trustees paid us for that cleanout job in 1903 and 1904. At that time the trustees had authority to levy their own taxes, funds and their own drainage funds. They haven't that authority now."

It was undisputed that the culvert was destroyed when the road was graded in 1940. But the record shows that it would be of little advantage to plaintiffs to merely restore the culvert now for the ditch across the Welch land has partially filled in. During late years part of the ditch on the Welch land was so shallow that the land was cultivated across the ditch.

I. The defendants introduced the records with respect to another drainage ditch called the Wilson ditch which runs in a north and south direction through the sections lying immediately east of section 24. These records show that all of plaintiffs' land lies in this Wilson drainage district. Upon this last documentary evidence with respect to the Wilson drainage district, the trial court based his decision that he was without jurisdiction to compel the opening of the culvert or the ditch across the Welch land. The trial court in his decree stated: ". . . to grant the prayer of plaintiffs' petition would be an attempt to usurp the power and authority of the Board of Supervisors given to it by statute to determine the course of drainage within the said Wilson Drainage District." But there was some evidence that there was high ground on the plaintiffs' land be-

tween the western part of plaintiffs' land and the Wilson ditch. It is somewhat significant that the east and west lateral to the Wilson ditch across section 24, as originally proposed, was to start at the west side of section 24 and on the center line of the section. This was changed, upon the engineers' recommendation so that the lateral as finally constructed starts with the center of the section. As stated there was abundant evidence that the land in the west portion of section 24 drained south and west. The plaintiffs on this appeal, in many divisions in their brief, argue that the evidence firmly establishes that the drainage of the west part of their land was south and west over the course of the old Bowman ditch, through the culvert across the road, and through the ditch across the Welch land. We have not detailed all of the evidence, for the defendants in their brief did not reply to the foregoing divisions in plaintiffs' brief but rely entirely on the proposition stated by the trial court, namely: That since plaintiffs' land was within the Wilson drainage district then this "conclusively shows the drainage is to the east." Defendants state in their brief that they pleaded as a defense to plaintiffs' petition that the plaintiffs' land was within the Wilson Drainage District. No such defense was in fact pleaded. We are not directed to any authorities holding that the establishment of a drainage district deprives the landowners therein of the rights to the free flowage of surface water as between dominant and servient holders of land within the district when the established ditch does not in fact drain off such surface water into the ditch. We hold that the mere fact that the land is within an established drainage district is not enough to preclude the owner of the land from asserting rights with respect to surface water that he would have if the land was not included in the district. If he can show that part of his land was not in fact drained by the established ditch but was in fact a dominant tract and drained by another natural or long established artificial watercourse across the servient land he is entitled to all the rights of the dominant holder as against the servient holder, the same as if the land was not within the drainage district. We think the evidence here clearly shows that the west part of plaintiffs' land was not drained by the Wilson ditch; that the drainage was to the south and west in the swale still partially existing from the old Bowman ditch that extends across the Welch land.

Headnote 3

II. Defendants argue that the Bowman ditch was not legally established. Of course they mean the ancient records now available do not show that every step required by law with respect to its establishment was complied with. But plaintiffs' rights do not depend upon the legal establishment of the Bowman ditch. The fact remains that there was such a ditch once dug and it remained a watercourse for the drainage of plaintiffs' land until partially destroyed by the filling up of that portion of the watercourse that was on the Welch land and completely destroyed by the destruction of the culvert by the board of supervisors when the road was graded in 1940.

Headnote 4

Plaintiffs' rights to the relief demanded depend upon whether they have acquired an easement in the watercourse and even if the Bowman ditch was not legally established it can still be an artificial watercourse upon which easement rights can be based if acquired by prescription. The rule is stated in 67 CJ 901 and 902, section 330:

"An artificial channel, as well as a natural channel, may be a watercourse . . . By what is said to be the weight of authority, that which was at first an artificial channel will become a natural watercourse when for all of the years of the prescriptive period it has taken the place,

and served principally in lieu, of a natural channel. Likewise, where neighborhood drainage ditches have been opened by common consent and used for a series of years, they become watercourse as fully as if they were not of artificial origin, and especially after the period of prescription has run."

III. The record here shows that the easement existed in favor of the dominant estate for the flow of surface water across the road and across the Welch land. It existed either by virtue of the concert of action by the ancient owners of all this land through which the Bowman ditch was constructed or it existed by prescription in that it was shown to be a watercourse openly used under a claim of right to convey the surface water from the dominant estate across the servient estate to the lake outlet. See Ehler v. Stier, 205 Iowa 678, 216 NW 637; Hatton v. Cale, 152 Iowa 485, 132 NW 1101; Neuhring v. Schmidt, 130 Iowa 401, 106 NW 630; Vannest v. Fleming, 79 Iowa 638, 44 NW 906, 8 LRA 277, 18 Am St Rep 387.

Headnote 5

Our holding that the easement existed means of course that the defendant board and the defendant Welch could not block up the watercourse. With respect to the board of supervisors, see Jacobson v. Camden, Iowa, 20 NW2d 407, 408, and cases there cited. In this case Justice Garfield, speaking for the court, stated:

Headnote 6

"It is the duty of highway authorities to place openings in highway grades so as to permit surface water to escape in its natural course from the higher to the lower lands."

IV. But there is no evidence that the ditch on the Welch land was stopped up by action of the landowner. While there is some evidence that the Welch land was cultivated over part of the ditch in recent years, the plaintiffs concede that the stoppage in the Welch ditch was from natural causes due to its filling up with dirt. The engineer testified that the bottom of the Welch ditch would have to be lowered approximately 3 feet in order adequately to drain off the surface water from plaintiffs' land.

It is the law that the owner of the servient estate, over whose land an easement exists in a watercourse, in favor of the owner of the dominant estate, must permit the cleaning out of the watercourse across his land. See, Wessels v. Colebank, 174 Ill 618, 51 NE 639; Bowman v. Bradley, 127 Or 45, 270 P 919; Dahlberg v. Lannen, 84 Mont 68, 274 P 151; Lamb v. Lamb, 177 NC 150, 98 SE 307; Holm v. Davis, 41 Utah 200, 125 P 403, 44 LRA NS 89; Pyott v. State, 170 Ind 118, 83 NE 737; 67 CJ 907.

Headnote 1

In Wessels v. Colebank, supra [174 Ill 618, 51 NE 641], the opinion states:

"The right to keep in repair a way is fully established. The cases on the subject of obstruction erected in or to watercourses or drains are quite numerous, but there seem to be few authorities in regard to the right of entering upon the land of the owner of the servient heritage, and removing obstructions occurring through natural causes in an artificial channel. In Chapman v. [Thames] Manufacturing Co. 13 Conn 269 [33 Am Dec 401], it was held that obstructions in an artificial channel, through which there exists the prescriptive right to flow the waters of a lake, though occasioned by natural causes, may be removed by the persons whose lands are overflowed, without there being any right on the part of the owner of the channel to object. In Roberts v. Roberts, 55 NY 275, the former owner of a tract of land had drained the upper part of it, by means of a ditch, into the lower part, and afterwards conveyed the tract in two parts to different persons. In an action by the owner of the upper tract against the owner of the lower tract the court said: 'If the ditch got out of repair by reason of floods or washing away its banks, or oth-

erwise, it was the legal right of the plaintiff to repair it, so as to restore it to its original condition, and make it subserve the purpose which it originally effected, of carrying off the water of the stream. He was entitled to have the ditch kept up as it was when he purchased, and to keep it in that condition, and, if necessary, to enter upon the defendant's lands to make repairs, doing no unnecessary injury.' In Liford's Case, 11 Coke, 46b, it is said: 'The law giveth power to him who ought to repair a bridge to enter into the land, and to him who hath a conduit within the land of another to enter the land and mend it, when cause requireth, as it was resolved in 9 Edw IV pl 35,' where it was held that the right to scour and amend a trench was incident to a grant of a right to dig it in another's land for the purpose of drawing water through the same; and the same doctrine is sustained in Peter v. Daniel, 5 CB 568. Washb Easem, c 6, § 1, pl 4. It would seem, therefore, that the common law annexes to the easement of a drain in another's land the right to go upon such land, and clean out or repair such drain without doing unnecessary injury to the land."

In Dahlberg v. Lannen, supra [84 Mont 68, 274 P 154], it is stated:

"It is well settled that a person having an easement in a ditch through the land of another may go upon the servient land and make all necessary repairs and clean the ditch. 9 RCLP 795; Holm v. Davis, 41 Utah 200, 125 P 403, 44 LRA NS 89; Carson v. Gentner, 33 Or 512, 52 P 506, 43 LRA 130."

In Holm v. Davis, supra, there is a quotation from Jones on Easements. The opinion states [41 Utah 200, 125 P 407]:

"The right of the owner of an easement is admirably stated by Mr. Jones in his excellent work on Easements, § 814, in the following words: 'The owner of a dominant estate having an easement has a right to enter upon the servient estate, and make repairs necessary for the reasonable and convenient use of the easement, doing no unnecessary injury to the servient estate.' A large number of cases in support of the doctrine are collated by the author in a footnote to the section aforesaid to which we refer the reader. The doctrine is also well illustrated and applied to an irrigating ditch by the Supreme Court of California in Joseph v. Ager, 108 Cal 517, 41 P 422."

The rule and illustration is thus stated in 17 Am Jur 1004:

"The dominant owner has the right of access to make repairs and may enter upon the servient estate for this purpose. He may not, however, inflict any necessary injury. To illustrate: A person having an easement in a ditch running through the land of another may go upon the servient land and use so much thereof on either side of the ditch as may be required to make all necessary repairs and to clean out the ditch at all reasonable times; he is liable only for the abuse of this right. It has also been held that the right of access is not limited to purposes of repairing, but may be exercised to make original constructions necessary for the enjoyment of the easement."

The case of Hatton v. Cale, 152 Iowa 485, 132 NW 1101, is much in point. There the defendant, a servient owner, sought, in a cross-bill, an injunction forbidding plaintiff, the dominant owner, from cleaning out a ditch across the defendant's land which had been established many years ago. The court held the plaintiff had an easement and denied the injunction forbidding him from cleaning out the ditch.

We held in Bina v. Bina, 213 Iowa 432, 239 NW 68, 78 ALR 1216, that the owner of a road easement across the land of another was entitled to repair the road to render it a suitable passage way. As stated in Bowman v. Bradley, supra [127 Or 45, 270 P 922], the easement for the flowage of water "differs from no other easement across the land of

another." It is our holding that plaintiffs are entitled to the relief demanded; that they are entitled to have the culvert restored and the ditch across the Welch land cleaned out.

V. As to the costs for constructing the culvert, it is clear that this should be borne by the
Headnote 7 county. The culvert was destroyed by the county in breach of its duty to place an opening to permit the free flowage of surface water, Jacobson v. Camden, supra.

VI. There is no showing by the plaintiff that the open ditch would benefit the Welch land. In plaintiffs' original petition there was no prayer that the owner of the Welch land clean out the ditch and no prayer that the cleaning out of the ditch be done at the expense of Verna Welch. The prayer was merely for a mandatory injunction requiring Verna R. Welch to permit the cleaning out of the ditch. In a subsequent reply plaintiffs alleged their willingness to pay their "proportionate share of the expense of such clean out." There is no evidence upon which we could make any fair apportionment. Ordinarily the owner of an easement across the land of another has the duty to repair the easement when he is the only party benefited by the easement.

It is our holding that the entire cost of the cleaning out of the ditch on the Welch land be
Headnote 2 borne by plaintiffs. We do not mean to imply that we would in an injunction action like this ever apportion costs in view of our statutes for the establishment of drainage districts and subdrainage districts where costs can be better apportioned. Plaintiffs sought a mandatory injunction to permit the cleaning out of the ditch on the Welch land. That injunction we give them but at their expense and subject to the rule that they commit no unnecessary damage. The culvert will be restored at the expense of the county. The decree of the trial court is reversed and the cause remanded for decree in conformity with this opinion.

Reversed and remanded.

All Justices concur, except Hays, J., who takes no part.

Petition for rehearing denied January 17, 1947.

ANNOTATION

Rights and duties of owners inter se with respect to upkeep and repair of water easement

[Easements, § 54]

I. Introduction

As a general rule, in the absence of an agreement, the owner of land subject to an easement of a nature which requires the maintenance of means for its enjoyment is not bound to keep such means in repair or to sustain any expense in maintaining them in a proper condition. The duty and privilege of constructing an easement or

ADDENDUM "B"

value; that he knew the power line and the place it crossed his land; that the market value of the defendant's farm before the construction of the power line was not to exceed $10,000; that the market value of the 30-foot strip without the poles upon it was $80 and with the poles $40; and that the balance of the farm was not injured nor the market value of it depreciated by reason of the construction and maintenance of the power line. Then, in response to further questions propounded to him on his direct examination, he further stated that he was acquainted with sales of lands similar in character to the defendant's land and that he had knowledge of the sale of a particular tract near the defendant's land and that he obtained such information from the agent of the parties who had purchased the tract. Thereupon the court, on its own motion, observed: "You are seeking to prove particular sales, are you? Counsel for Plaintiff: Yes, sir." The court stated: "That is not admissible under the rule on direct examination" —and observed that such things may be inquired about on cross-examination and then on redirect, but not on the direct examination. "Counsel: Do I understand the court to rule, then, that the witness on direct examination cannot give his statement of particular values of similar property? Court: Yes; that is the uniform practice." This ruling is complained of. As stated in 1 Elliott, Ev. § 180, Jones, Ev. (2d Ed.) § 168, and 13 Ency. Ev. pp. 457–463, there is a marked conflict of opinion as to the competency of evidence on direct examination to show the sale price of other lands of general similarity in location, character, and adaptability to use of the lands sold with those the value of which is in question, and of sales made about the time the value of the latter must be established. The cases supporting the affirmative and those the negative of the proposition are there noted. Even though the conclusion should be reached that such sales may properly be shown on the direct examination, yet we are clearly of the opinion that in this instance the plaintiff was not harmed by the ruling. The witness had already stated that he had bought and sold lands; that he knew of sales of lands similar to that of the defendant; that he knew the market value of such lands and the market value of the defendant's land, and stated what that was, and the amount which in his opinion the value of the defendant's land was depreciated by reason of the construction of the power line over it. In such case the plaintiff was not prejudiced even though it be assumed that it, on the direct examination of the witness, was entitled to show sales of other lands. Seattle & M. Ry. Co. v. Gilchrist, 4 Wash. 509, 30 Pac. 739; Teele v. Boston, 165 Mass. 88, 42 N. E. 506; Sargent v. Merrimac, [illegible] E. 970, 11 L. R. A. (N. S.) 996, 124 Am. St. Rep. 528. At any rate, it is not such an error, if there be one, as requires a reversal of the judgment.

We are of the opinion that no reversible error is shown, and that the judgment of the court below ought therefore to be affirmed, with costs. It is so ordered.

FRICK, C. J., and McCARTY, J., concur.

HOLM v. DAVIS et al.

(Supreme Court of Utah. June 12, 1912.)

1. TRIAL (§ 400*) — FINDINGS—AMENDMENT.

Comp. Laws 1907, § 3005, confers jurisdiction on the court under certain circumstances to relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect on such terms with reference to costs as may be proper, etc., and section 3168 provides that, on the trial of a question of fact by the court, its decision must be given in writing and filed with the clerk within 30 days after the cause is submitted for decision, but that the court at any time before notice of appeal is served or filed, or before motion for a new trial is ruled on, may add to or modify the findings in any respect so as to make the same conform to the issues presented by the pleadings and to the evidence adduced at the trial, but that no such additions to or modifications of the findings shall be made, unless notice in writing, specifying generally the additions or modifications desired, shall have been served on the adverse party or his attorney. *Held* that, independent of such sections, the court, after the expiration of the term at which an action was tried and determined, notwithstanding the pendency of a motion to retax costs, had no jurisdiction to modify the findings on its own motion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 949, 950; Dec. Dig. § 400.*]

2. LICENSES (§ 44*)—USE OF REAL PROPERTY —EASEMENT DISTINGUISHED.

Where intervener constructed and used a canal over plaintiff's land for a millrace and irrigation ditch to furnish water for motive power for the mill, and to irrigate certain lands, and such canal, though originally constructed by consent of plaintiff's grantor, had been used and maintained for such purposes for more than twenty years when plaintiff purchased the same, intervener's right to maintain, protect, and improve it was not a mere license, but an easement acquired by prescription.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 97–99; Dec. Dig. § 44.*]

3. WATERS AND WATER COURSES (§ 154*)— WATER CANAL—MAINTENANCE.

Where intervener had acquired a prescriptive easement to maintain a water canal over plaintiff's land, intervener was entitled to enter on the land to clean out and make necessary repairs to the canal, doing no unnecessary injury to the servient estate.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 167–179; Dec. Dig. § 154.*]

4. MASTER AND SERVANT (§ 302*)—INJURIES TO THIRD PERSONS—TRESPASS BY SERVANTS.

Where defendant, having an easement to maintain a water canal over plaintiff's land, sent workmen to clean out and repair the canal, a finding that they trespassed on ground not necessary for their work was insufficient to

so trespassing the workmen acted beyond the scope of their employment, rendering themselves, and not intervener, liable for their acts.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1217–1221, 1225, 1229; Dec. Dig. § 302.*]

Appeal from District Court, Utah County; J. E. Booth, Judge.

Action by Annes Holm against Warren E. Davis, in which the Spanish Fork Co-operative Institution intervened. Judgment for plaintiff, and intervener appeals. Reversed and remanded.

A. Saxey, of Spanish Fork, for appellant. Elias Hanson, of Spanish Fork, for respondent.

FRICK, C. J. The respondent commenced this action against the defendant Davis to recover damages for trespasses that it is alleged said Davis by himself and "by his agents" had committed on respondent's land, which is specifically described in the complaint. Davis answered, justifying the alleged trespasses. His answer is, however, not material to the real questions involved here, and therefore will not be referred to hereafter. The appellant asked and was given leave to intervene in the action commenced against Davis as aforesaid, and in its complaint in intervention it in substance alleged that the fee to the land in question was in the respondent; that it was the owner, and for many years prior to the commencement of the action had been the owner, of a flouring mill which it operated by water power, which water was obtained from Spanish Fork river by means of a canal or ditch about three miles in length; that said canal or ditch passed through respondent's land, and that the same was constructed, owned, occupied, and used by appellant for the purposes of conducting water through the same to said mill for a period of 25 years without molestation or interference from any one, and for about 23 years before the respondent purchased and became the owner of the land in question; that the appellant claims the right to use, maintain, and repair said canal as an easement over said land, and that the acts complained of by respondent were committed by appellant's agents and employés by going on and along said canal or ditch for the purpose of making repairs that were necessary and required, and for that purpose removed sand and gravel that had accumulated in said canal, and which had to be removed to permit the necessary water to flow through the same to said mill; that said sand and gravel were carefully removed and deposited along the margin of the bank of said canal, and that no unnecessary thing was done or act committed in doing said work. Respondent answered the complaint, admitting the allegations therein, except that appellant [illegible] over his land. The issues were tried to [illegible] court without a jury. The court, after [illegible] ing a personal inspection of the canal [illegible] ditch, on the 27th day of May, 1911, [illegible] the following findings of fact and [illegible] sions of law: "That the plaintiff is the [illegible] er of the land described in his complai[illegible] that the defendant, the Spanish Fork [illegible] operative Institution, a corporation, has [illegible] millrace, which race is also used as an [illegible] rigation canal, running through the [illegible] land on a sidehill, and has maintained [illegible] canal for more than 20 years, and whi[illegible] was built with the consent of the then ow[illegible] er of the land; that it is necessary fro[illegible] year to year that the said canal should [illegible] cleared out and repaired; that the defe[illegible] ant Warren E. Davis, in May, 1910, as [illegible] employé of the said defendant corporatio[illegible] with the assistance of other men, clea[illegible] out and repaired the said ditch; that [illegible] performing the work necessary thereto [illegible] unnecessary damage or injury was done [illegible] the ground of the plaintiff, *but the workm[illegible] trespassed on ground not necessary for sa[illegible] work;* that neither of said defendants [illegible] ther made or attempted to make any [illegible] rangements with the plaintiff whereby th[illegible] might go onto plaintiff's ground for [illegible] performance of said work; that the pla[illegible] tiff has sustained only nominal damag[illegible] Judgment should therefore be for the pla[illegible] tiff that he recover damages in the sum [illegible] $1, and that the defendant, the Spani[illegible] Fork Co-operative Institution, a corporati[illegible] pay the said sum of $1, and the costs [illegible] this suit." The appeal is upon the judgm[illegible] roll without a bill of exceptions containi[illegible] the evidence. All that we can determ[illegible] therefore, is whether the pleadings and fi[illegible] ings of fact sustain the conclusions of la[illegible] and judgment.

[1] It is not necessary to refer to the pleadings further than has been done. As we have seen, the findings constituting the decision of the court were filed on the 27th day of May, 1911, during the April term of court. Thereafter, to wit, on the 26th day of August, 1911, after the April term of court had been adjourned without date, and pending the July term, the court modified its findings of fact by inserting that portion thereof which we have italicized. Appellant at the time objected to the court's authority to make the modification in the findings, and now insists that the court exceeded its power or jurisdiction in making the modification of the findings as indicated, and that, therefore, for the purposes of this decision, said modification must be deemed as not having been made. Did the court exceed its power in making the modification complained of by appellant? It is practically conceded by respondent, at least it is not controverted by him, that the findings were [illegible]

modification thereof was made in the following July term. We shall assume that under the decisions of this court the district court had the power to modify its findings at any time before the adjournment of the term during which they were made and filed, and that said modification could also be made if made in accordance with the provisions of Comp. Laws 1907, § 3168, or under the provisions of section 3005. In the case at bar, the findings were, however, modified after the term, and no attempt was made to conform to the provisions of either one of the foregoing sections. The question, therefore, is, Did the court of its own motion have the power to make a modification of its findings at the time and in the manner disclosed by this record? Respondent's counsel seeks to justify the action of the court on the ground that appellant had filed a motion to retax costs during the April term which remained pending and was finally disposed of by the court on the 26th day of August and at the time the modification was made, all of which was during the July term. The motion to retax costs was based upon the findings as they then stood, and under which appellant's counsel contended his client could not be required to pay costs under our statute. The court seemed to appreciate the force of counsel's contention in that regard, and thus modified the findings so that the costs could legally be taxed against appellant. The motion to retax costs certainly was not made nor intended for the purpose of having the court modify its findings under the provisions of section 3168 or under section 3005, supra. Indeed, the motion was filed and intended for an entirely different purpose. The motion therefore was not and in the nature of things could not have invoked the power of the court to modify its findings within the purview of the two sections referred to. Nor, in view that the term of court at which the findings were made and filed had been finally adjourned, did the court possess inherent power to make the modification complained of. That the court cannot legally make modification of its findings after the term has expired when such modification is not made under and in conformity with the provisions of either one or the other of sections 3168 or 3005, supra, so as to extend the time within which to take an appeal was held by us in the case of Atwood v. Davis at the October, 1911, term of this court. The question having been determined on a motion to dismiss the appeal, no opinion was filed, but the appeal dismissed. We are of the opinion, therefore, that the court in making the modification of the findings as aforesaid on its own motion after the term had expired exceeded its power, and that the findings must, for the purposes of this decision, be treated as though no such modification

Treating the findings, therefore, as originally made and filed by the court, do they sustain the conclusions of law and judgment entered against appellant for the sum of $1 damages and for costs? Counsel for appellant insists that, in view that the court found that the canal or ditch in question had been constructed over appellant's land for more than a sufficient length of time to constitute said canal or ditch an easement on or over his land, therefore appellant had a legal right to enter upon and along said canal or ditch to repair and clean out the same if the work was done without unnecessary injury to respondent's land or property, and therefore appellant was not guilty of trespass, and, if this be so, the conclusion of law and judgment for damages and costs are not sustained by said findings, and cannot prevail. Counsel for respondent contends that, because the court found that the canal was originally constructed "with the consent of the then owner of the land" in question here, the canal was constructed and maintained under a license from the owner of the land, and that, where such is the case, no easement is acquired, and therefore none exists in this case. The foregoing contentions present the real question in the case.

[2] We have no means of determining what the evidence was, and the court's findings are far from specific. In view, however, that both parties have expressed an earnest desire that we should, if possible under the findings as they are, determine whether the canal in question constitutes an easement or not, we have concluded that in view of the permanent character of the canal and the purposes for and time during which it was constructed, maintained, and used, the findings are sufficient to enable us to determine that question, although the findings are somewhat meager in detail. The findings show that the canal was constructed and used for a millrace and irrigating ditch to furnish water for motive power for a mill, and to irrigate lands to make the same productive; that the canal had been constructed, maintained, and used for the purposes aforesaid for more than 20 years when respondent purchased and became the owner of the land over which the canal was constructed and maintained. If the canal during the 20 years was maintained and used adversely and under a claim of right, such use for that length of time would have ripened into a prescriptive right constituting an easement. This has been the uniform holding of this court. See Lund v. Wilcox, 34 Utah, 205, 97 Pac. 33, and cases there cited. Counsel for respondent in effect concede the law in this state to be so, but he contends that, because the court found that the canal was originally constructed with the consent of the owner of the land, the claim of adverse user under claim of right has no

does not necessarily follow that because a ditch or any other permanent structure is constructed on or over the lands of another with such other's consent the use and maintenance thereof by the person who constructed it or his assignee cannot be adverse and under a claim of right within the purview of the law governing easements acquired by prescription. The question to a large extent depends upon the character of the use or thing which is claimed as an easement, and the object or purpose for which the thing was constructed, used, and maintained. In this case the canal or ditch was constructed for a purpose which was permanent in its nature. We may well assume that no one would build a mill and construct a canal three or more miles in length for the purpose of providing water for motive power to operate the mill and irrigate the arid lands, except as a permanent thing. That such is the case is natural, and must be obvious to all, and hence needs no argument or elaboration. The fact, therefore, that the canal was on the land and was being used for the purposes aforesaid was notice to the respondent that it was a structure of a permanent character used for purposes permanent in their nature, and hence he purchased the land subject to the rights of the owner of the canal. If the right to use the same, therefore, had ripened into a prescriptive right by the lapse of time and the character of its use, respondent purchased and holds the land subject to appellant's right to maintain and use the canal for the purposes for which it was constructed, maintained, and used from its inception. This is well illustrated by the courts in the following cases: Jewett v. Hussey, 70 Me. 433, and Coventon v. Seufert, 23 Or. 548, 32 Pac. 508. In both of those cases it is held that, although the inception of a prescriptive right rests in parol by the permission of the owner of the land over which it is claimed, yet, if the right of way or ditch is used and enjoyed under a claim of right to use and enjoy it as owners of such property usually use and enjoy their own, the claimant obtains a prescriptive right to the use of the easement. In Arbuckle v. Ward, 29 Vt. 53, the court, in referring to this subject, says: "But the mere fact of showing that the use began by permission of the landowner is not alone sufficient to defeat the prescription." In Coventon v. Seufert, supra, the Supreme Court of Oregon, in passing on how a right to use an irrigating ditch over the lands of another may be acquired by use, states the law in the following language: "That the use began by permission does not affect the prescriptive right if it has been used and exercised for the requisite period under claim of right. * * * If the use of the way is under a parol consent given by the owner of the servient tenement to use it as if it were legally conveyed, it is a use as of right. * * * The plaintiffs have used the ditch as if it had been legally conveyed to them—that is, they have exercised such acts of ownership over it as a man would over his own property—and the court must presume in the absence of any evidence to the contrary that the settlement was a parol consent or transfer * * * of the right to use the ditch, and hence it was a use as of right." The court also held that, in view that the party who claimed the easement had used it for the purposes intended for a period longer than would create a prescriptive right, "the burden of proving that plaintiffs held possession by license or indulgence was cast upon the defendants." To the same effect, see Jones on Easements, § 182.

[3] Keeping in mind, therefore, the permanent character of the canal in question and the purposes for which it was constructed, used, and maintained, and that such use had been for a period longer than 20 years, we are forced to the conclusion that the mere fact that the court found that the canal was originally constructed "with the consent of the then owner of the land" cannot affect appellant's prescriptive right. If such were not the law, then in this state, in view of the arid character of the land embraced within its borders, but few irrigating ditches could now be maintained. This is apparent to all, for the reason that in many if not most instances such ditches were at least in part constructed over lands owned by others either with the express or implied permission or consent of the owners thereof. If the owners of lands over which ditches have been thus constructed can now claim, as is claimed by respondent, that the owners and users of those ditches have acquired no right to maintain them for the reason that the ditches or canals were in fact constructed with the consent of the original owners of the lands, and hence the ditch users are mere licensees, and their ditches, flumes, and canals are maintained and used only by the sufferance or indulgence of the landowners, then the law has proved to be a mere delusion and a snare. In settling and reclaiming the arid lands much that in early days was deemed entirely worthless has now acquired considerable value. Over such lands miles of ditches, flumes, and canals were constructed with either the express or implied consent of the owners thereof. Can such owners, after a lapse of all these years, now treat the owners of the ditches as mere trespassers? We think not. Upon the other hand, we are of the opinion that, although a canal, ditch, or flume may have been constructed by a person on or over lands owned by another with the consent or permission of such other owner, yet, if the owner of the canal, ditch, or flume, or his assignee, has used and maintained the same in the same manner as if the same were constructed over his own lands, and where such use and maintenance has continued uninterruptedly and under claim of right for

ore than twenty years, in such event the ner of the ditch has acquired a right to e and maintain the same perpetually as easement.

In view of the foregoing, what were the hts of appellant with respect to entering pon the lands of respondent to repair and lean out the ditch or canal in question? he right of the owner of an easement is dmirably stated by Mr. Jones in his exellent work on Easements, § 814, in the folowing words: "The owner of a dominant state having an easement has a right to nter upon the servient estate, and make repairs necessary for the reasonable and conenient use of the easement, doing no unnecssary injury to the servient estate." A large number of cases in support of the doctrine are collated by the author in a footote to the section aforesaid to which we refer the reader. The doctrine is also well illustrated and applied to an irrigating ditch by the Supreme Court of California in Joseph v. Ager, 108 Cal. 517, 41 Pac. 422. The finding in the case at bar "that in performing the work necessary thereto no unnecessary damage or injury was done to the ground of the plaintiff" while not as specific as could be desired, yet must be construed to mean that what appellant by its servants and employés had a right to do, namely, to enter upon respondent's land along the canal or ditch in question for the purpose of repairing and cleaning out the same, and, if in doing the work no unnecessary injury was done to respondent's land, appellant cannot be charged as a trespasser. Under the findings as originally made, appellant therefore was clearly within its rights in doing the acts complained of. It was only after the court thought that it was necessary to change the findings to support the judgment for nominal damages and costs that appellant's servants were charged with having trespassed on respondent's land.

[4] So far we have considered the question upon the theory that the findings as modified would make the appellant liable as a trespasser. If the amendment by the court be considered and applied literally as written, it may well be doubted whether appellant would be liable, even though the finding were proper and true in fact. If appellant's "workmen trespassed on ground not necessary for said work" willfully, unnecessarily, and when not acting within the scope of their duties or employment in repairing or cleaning out the canal, they, and not appellant, should have been held as trespassers. We, however, do not desire to base the decision upon such narrow ground. What we hold is that under the facts found by the court the ditch or canal constitutes an easement over respondent's land which appellant had a right to maintain, and for that purpose has a right to go upon the land of respondent along the ditch, and to use so much thereof on either side of the ditch as may be necessary to make all necessary repairs and to clean out said ditch at all reasonable times, and that appellant is liable only for the abuse of such right; that in this case no such abuse is shown, and hence the judgment against appellant cannot prevail.

The judgment is reversed, and the cause is remanded to the district court, with directions to strike from the findings that portion indicated in italics and inserted therein on August 26, 1911, to vacate the conclusions of law and to modify the same to conform to the law herein stated, and to enter judgment dismissing the action, and to apportion the costs as in the judgment of the court may be just and equitable. Appellant to recover costs in this court.

McCARTY and STRAUP, JJ., concur.

JOHNSON v. UTAH CONSOL. MINING CO.

(Supreme Court of Utah. June 7, 1912.)

MASTER AND SERVANT (§ 221*)—INJURIES TO SERVANT—PROMISE TO REPAIR—MASTER'S LIABILITY—ASSUMED RISK.

Where a master has made a promise to repair a defect, the master and not the servant assumes the risk of injury caused thereby within such time after the promise as would be reasonably allowed for performance and within a period which would not preclude all reasonable expectation that the promise might be kept.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 638–640, 642–645; Dec. Dig. § 221.*]

Appeal from District Court, Salt Lake County; M. L. Ritchie, Judge.

Action by Nels Johnson against the Utah Consolidated Mining Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with directions.

Plaintiff brought this action to recover damages for personal injuries alleged to have been sustained by him on May 28, 1909, while employed as a miner in defendant's mine in Bingham Canyon, Utah.

The complaint, in substance, alleges that defendant, a corporation, owns and operates the Highland Boy Mine in Bingham Canyon, Utah; that on the day of the injury plaintiff was employed in the capacity of a miner and machineman in a certain stope on the eight and a half level of the mine; that defendant carelessly failed and neglected to furnish plaintiff a reasonably safe place in which to perform the work required of him under his contract of employment; that plaintiff, after he began work, apprehended that the earth and rock over the point where he was at work was unsound and required timbering in order to make the place reasonably safe, notified defendant's shift boss of the condition, and told him that the place needed timbering; that the shift

ADDENDUM "C"

being so, the court should have ordered the jury to return a verdict of not guilty on account of former jeopardy, and erred in not so doing. State v. Gomez, 58 Mont. 177, 190 P. 982.

The judgment appealed from is reversed and the cause remanded with direction to dismiss the action.

JOHNSON, C. J., and ERICKSON, ANDERSON, and MORRIS, JJ., concur.

LADEN et al. v. ATKESON.

No. 8135.

Supreme Court of Montana.

June 28, 1941.

Rehearing Denied Sept. 26, 1941.

1. Easements ⇐1
Waters and water courses ⇐153

Generally "easement" is a right which one person has to use the land of another for a specific purpose or a servitude imposed as a burden upon land, as for example, an easement in a ditch through the land of another.

See Words and Phrases, Permanent Edition, for all other definitions of "Easement".

2. Easements ⇐53

The right to enter upon servient tenement for purpose of repairing or renewing artificial structure, constituting an easement, is called a "secondary easement", which is a mere incident of the easement that passes by express or implied grant or is acquired by prescription.

See Words and Phrases, Permanent Edition, for all other definitions of "Secondary Easement".

3. Waters and water courses ⇐156(7)

A person having an easement in a ditch running through the land of another may go upon the servient land and use so much thereof on either side of the ditch as may be required to make all necessary repairs and to clean out the ditch at all reasonable times.

4. Easements ⇐50

Secondary easements can be exercised only when necessary and in such a reasonable manner as not to needlessly increase burden on servient tenement.

5. Easements ⇐53

The owner of dominant estate having easement has right to enter on servient estate and make repairs necessary for reasonable and convenient use of easement, doing no unnecessary injury to servient estate.

6. Easements ⇐40
Waters and water courses ⇐156(2)

When the use of a thing is granted, everything is granted by which grantee may reasonably enjoy such use, that is, rights that are incident to something else granted, such as water and ditch rights.

7. Waters and water courses ⇐158½(1)

In suit by owners of a ditch right across defendant's lands, to quiet title to easement across defendant's lands for purpose of keeping ditch in repair, evidence warranted action taken by trial court in decreeing to owners the use of a particular route across defendant's land, on ground that such route was usual and customary mode of entering defendant's lands for purpose of repair of ditch, and was a reasonable route.

8. Easements ⇐53

An easement for travel across servient tenement is a "property right" belonging exclusively to dominant owners, who are responsible for the necessary upkeep of the way in so far as dominant owners' use of way is concerned.

See Words and Phrases, Permanent Edition, for all other definitions of "Property Right".

9. Easements ⇐49

Dominant owners having easement for travel over servient tenement cannot legally be permitted to roam all over the servient tenement and cannot select a new route of travel without consent of owner of servient tenement whenever the particular route set aside for dominant owners becomes founderous, impassable or merely inconvenient, and duty is primarily on dominant owners to repair the route rather than materially deviate therefrom.

10. Easements ⇐50, 55, 64

An owner of easement over servient tenement must use easement in such a manner as not to inure the rights of owner of

servient tenement, and easement owner exceeding his rights either in the manner or the extent of use, or entering upon or using servient tenement for unauthorized purposes, is guilty of a "trespass", and owner of servient tenement can maintain action against owner of easement, although no actual damages have been sustained by owner of servient tenement.

See Words and Phrases, Permanent Edition, for all other definitions of "Trespass".

11. Easements ⇦64

An action for damages by owner of servient tenement will lie against owner of easement on due proof of abuse of easement rights.

12. Waters and water courses ⇦158½(1)

A judgment awarding to owners of a ditch right across defendant's land, an easement across defendant's land to keep ditch in repair, and designating a described route to be used at all times that such route was reasonably susceptible of travel, and authorizing owners to use such other route as would afford owners a reasonable and practicable means of ingress to and egress from ditch whenever described route was not reasonably susceptible of travel, did not place burden of repair on defendant, but owners had duty of repairing described route where reasonably practicable.

13. Waters and water courses ⇦158½(1)

Where owners of a ditch right across defendant's land needed dam or other artificial structure or device in order to take their water from river, owners were properly awarded so much of defendant's land at head of ditch and along bank of river as might be reasonably needed for constructing, maintaining or repairing dam in river near head of ditch, and such award did not give owners unrestricted right to construct dam anywhere in river they might desire.

14. Waters and water courses ⇦156(7)

An owner of easement to maintain dam has right to repair breastwork of dam and banks at sides of dam, and has right to go on land of servient tenement for such purpose, and has further right to restore dam that has been carried away by a freshet.

15. Waters and water courses ⇦156(7)

In repairing a ditch or water race, owner of easement has incidental right to adjacent soil of servient tenement if repairs cannot be made in any other way.

16. Easements ⇦47

A material change of location of easement cannot be made without consent of servient owner, in absence of showing of prescriptive or legal right to change.

17. Waters and water courses ⇦158½(1)

A judgment properly awarded to persons having a ditch right across defendant's land, the use of so much of defendant's land on either side of ditch as might be reasonably necessary for maintenance and repair of ditch, notwithstanding that no absolute amount of land on either side of ditch was granted.

Appeal from District Court, Fifth District, Beaverhead County; H. G. Rodgers, Judge.

Suit by Patrick Laden and another against Arthur L. Atkeson to quiet title to certain alleged easement rights in defendant's lands. From the judgment, the defendant appeals.

Affirmed.

John Collins, of Dillon, for appellant.

T. F. McFadden, of Dillon, for respondents.

ERICKSON, Justice.

Plaintiffs are the owners of certain agricultural lands in Beaverhead county, and a water right appurtenant thereto in the Beaverhead river. Water is carried to their lands through certain ditches and sloughs located on the lands of defendant. A dam is maintained near a point in the river from which the main diversion ditch is taken. To keep the dam and ditches leading therefrom in repair, plaintiffs must enter upon defendant's lands with dam building materials and other paraphernalia and vehicles for those purposes.

It is alleged in the complaint that plaintiffs entered upon defendant's lands in furtherance of these purposes from March, 1931, until May, 1937, at which latter time defendant instructed plaintiffs to desist and refrain from so doing, or persist at their own risk. Plaintiffs refrained and thereafter instituted this suit for the purpose of quieting title to certain alleged easement rights in defendant's lands. They were successful before the lower court, sitting without a jury, and were adjudged entitled to enter defendant's lands over a certain described road in order to reach the head of their diversion ditch, and also were giv-

en the use of whatever lands on either side of the ditches were reasonably necessary to plaintiffs' repair thereof. The ditch right across defendant's lands is not contested. From the judgment and decree defendant brings this appeal.

The errors assigned complain, in addition to the granting of any right in plaintiffs to travel across defendant's lands, of the extent and generality of the court's findings and judgment, as follows: "(1) In granting to plaintiffs the right to travel over defendant's lands 'upon and across said lands by such other route as will afford them a reasonable and practicable means of ingress to and egress from the head of their said Diversion Ditch under all the conditions then obtaining.' (2) In granting to plaintiffs the right to travel at will, across appellant's lands 'by such a route as will afford them a reasonable and practicable means of ingress to and egress * * *.' (3) In awarding to plaintiffs a right not only to maintain the dam already constructed upon appellant's lands, but also 'to use so much and such parts of said lands at the head of said Diversion Ditch and along the easterly bank of said Beaverhead River, as may be reasonably needed and required for the purpose of constructing a dam in said River.' (4) In permitting the plaintiffs to deviate from the alleged line of travel described in paragraph XVI of the Findings whenever that line 'is not reasonably susceptible of travel.' (5) The findings do not support the conclusion that a right of way for travel across the land of defendant was selected and used in such a definite way as to impress an easement upon that land. (6) The effect of the decree is to give to plaintiffs the use of an indefinite amount of defendant's land, as a secondary easement. (7) The evidence is not sufficient to warrant the establishment of a right of way, of indefinite width, for travel, upon either side of plaintiffs' ditch."

On the trial of the cause much testimony was introduced relative to the ways by which plaintiffs and their predecessors passed over defendant's lands in attending to the dam and ditches. Whether the efforts of counsel were directed toward proving or disproving a prescriptive right in plaintiffs to cross by a certain prescribed route, and the success or otherwise of that proof, seems, under the law governing this case, immaterial in view of the court's findings and the evidence adduced in support thereof. It is sufficient to say the court did not recognize a prescriptive right in plaintiffs, but rather "a right in the nature of a secondary easement."

[1] Generally speaking, "an easement has been asserted to be a right which one person has to use the land of another for a specific purpose or a servitude imposed as a burden upon land." 17 Am.Jur. sec. 2, p. 923. For example, an easement in a ditch through the land of another. Dahlberg v. Lannen, 84 Mont. 68, 274 P. 151.

[2, 3] "The right to enter upon the servient tenement for the purpose of repairing or renewing an artificial structure, constituting an easement, is called a 'secondary easement,' a mere incident of the easement that passes by express or implied grant, or is acquired by prescription." 2 Thompson on Real Property, p. 343; 19 C. J. sec. 208, p. 970; 26 Cal.Jur. p. 163; and Jones on Easements, secs. 811 and 812, pp. 653, 654. To illustrate: "A person having an easement in a ditch running through the land of another may go upon the servient land and use so much thereof on either side of the ditch as may be required to make all necessary repairs and to clean out the ditch at all reasonable times." 17 Am. Jur. sec. 108, p. 1004; Dahlberg v. Lannen, supra; Felsenthal v. Warring, 40 Cal.App. 119, 180 P. 67.

[4, 5] Kindred to the above is the equally well-established rule that: "Such secondary easements can be exercised only when necessary and in such a reasonable manner as not to needlessly increase the burden upon the servient tenement." Jones on Easements, sec. 811, p. 653; 19 C.J., sec. 208, p. 970; 2 Thompson on Real Property, p. 343. Or, as it is sometimes stated: "The owner of a dominant estate having an easement, has the right to enter upon the servient estate and make repairs necessary for the reasonable and convenient use of the easement, doing no unnecessary injury to the servient estate." Jones on Easements, sec. 814, p. 655; 17 Am.Jur., sec. 108, p. 1004.

[6] These rules are founded on the maxim of the law, that when the use of a thing is granted, everything is granted by which the grantee may reasonably enjoy such use, that is, rights that are incident to something else granted,—here to water and ditch rights. Yellowstone Valley Co. v. Associated Mortgage Investors, 88 Mont. 73, 290 P. 255, 70 A.L.R.

son on Real Property, p. 343; 19 C.J., sec. 208, p. 970; 26 Cal.Jur. p. 163.

[7] With these general rules we agree. In reviewing the lower court's findings and judgment, under the guidance of these rules, the principal question presented, and in our opinion determinative of all the issues, is, Does the court's decision, based upon the evidence, decree to plaintiffs practical and reasonable ways of travel upon defendant's lands for the necessary maintenance of their irrigation system, inflicting no unnecessary injury to such lands or defendant's use thereof?

From the voluminous record we have concluded that possibly more than one route does exist across defendant's lands to the head of plaintiffs' diversion ditch. The question as to the particular route that will result in the minimum of injury to defendant's lands, having in mind his convenience in the use thereof, was determined by the court to be the precise way alleged to have been used by plaintiffs in the matter of attending to their irrigation system upon defendant's lands. The record amply supports and justifies the action taken by the court in decreeing to plaintiffs the use of the way just mentioned. Despite any evidence tending to show some deviation from the particular line of travel alleged, it is significant and compelling in support of the court's findings that the way decreed to plaintiffs' use constituted the only roadway across defendant's lands reasonably susceptible to their needs and purposes.

In our opinion, the way decreed to plaintiffs for purposes of going to and from the head of their diversion ditch constituted a reasonable one under the record. There is evidence that this particular way, or approximately so, had been used for a number of years by plaintiffs and predecessors of a much earlier time in the matter of the maintenance of the irrigation system involved. It substantially appearing that this was the usual and customary mode of entering upon defendant's lands for purposes of repair, we are inclined to believe that that showing constitutes good evidence of the reasonableness of the route used in the absence of a showing to the contrary. The record does not preponderate with evidence of any other route or way designed to accommodate plaintiffs' needs in a manner less injurious to defendant's lands than the way awarded, or one more absence of that preponderative showing, we have no alternative but to affirm the lower court in respect to the route granted. In this situation, we think a rehearsal of the evidence would serve no useful purpose.

[8] In paragraph IX of the judgment and decree the court recognizes in plaintiffs the right to proceed to the head of the diversion ditch over the particular road described, "at all times the same is reasonably susceptible of travel; and if and when said roadway is not reasonably susceptible of travel, the plaintiffs shall during such times pass over, upon and across said lands by such other route as will afford them a reasonable and practicable means of ingress to and egress from the head of their said 'Diversion Ditch' under all of the conditions then obtaining." Defendant complains of this holding because, he asserts, it fails to take into account one well-established rule relative to secondary easements, namely, that there is no burden upon the servient owner (defendant here) in the absence of an agreement, to keep in repair for the dominant owners the means necessary to the enjoyment of the primary easement—here the roadway to the head of the diversion ditch. 17 Am.Jur., sec. 108, p. 1003, and 19 C.J., sec. 228, p. 980. The easement for travel upon defendant's lands is a property right belonging exclusively to the plaintiffs, the dominant owners (17 Am.Jur., sec. 108, p. 1003), and they are responsible for the necessary upkeep of the way in so far as their own use of it is concerned.

[9-11] Dominant owners cannot legally be permitted to roam all over the servient tenement in cases such as this; nor can they select a new route of travel, without the consent of the servient owner, whenever the particular route set aside for that purpose becomes founderous, impassable, or merely inconvenient. The duty is primarily upon them, in such instances, to repair their route rather than materially deviate therefrom. 17 Am. Jur., sec. 88, p. 989. In this regard Corpus Juris states the rule to be: "One having an easement in another's land is bound to use it in such a manner as not to inure the rights of the owner of the servient tenement. If the owner of an easement exceeds his rights either in the manner or the extent of its use, or if he enters upon [illegible] for

a trespass and the servient owner may maintain such action, although no actual damages have been sustained by him." 19 C.J., sec. 247, p. 989. In other words, an action for damages will lie on due proof of abuse of the easement right. Holm v. Davis, 41 Utah 200, 125 P. 403, 44 L.R.A., N.S., 89.

[12] The judgment, we believe, needs no modification as to this holding. We do not think it may be so broadly interpreted as defendant fears. That there may be no misunderstanding of it, we have here set out the controlling rules with respect to the matters covered by finding No. 9. Plaintiffs, depending upon the factual situation, must repair their way where reasonably practicable; otherwise the possibility would exist of having the burden upon the servient tenement needlessly increased contrary to the underlying law of all easements.

[13, 14] Complaint as to the court's award to plaintiffs of the use of "so much and such parts of said lands [of defendant] at the head of said 'Diversion Ditch' and along the easterly bank of said Beaverhead River, as may be reasonably needed and required for the purpose of constructing a dam in said River near the head of said 'Diversion Ditch' or for the purpose of making any repairs necessary to the maintenance of said dam" etc., is without merit. As before noted, the ditch right in plaintiffs is not contested and it apparently is admitted by all, that in order for plaintiffs to take their water from the river a dam or some other artificial structure or device is needed for the purpose. Here a dam in the river serves that purpose. In Jones on Easements, sec. 814, p. 655, the following observation is made in that connection: "An easement to maintain a dam necessarily involves the right to repair it, and this involves also the right to go upon the land for that purpose. The easement includes not merely the right to maintain and repair the breastwork of the dam, but also the banks at the sides of it, and to go upon the land of the servient tenement for that purpose. It also includes the right to restore a dam that has been carried away by a freshet."

[15] In the same test, sec. 820, p. 659, the author recognizes the right to use adjacent soil for purposes of repair in this language: "In repairing a ditch or water-race, the owner of the incidental right to use the adjacent soil for this purpose, in case the repairs cannot be made in any other way. The fact that the earth so used is the property of the owner of the servient tenement does not settle the question whether the owner of the easement may take it for the purpose of making repairs. 'The owner of the easement is privileged to repair in all cases where the easement cannot be enjoyed without repairs; and in making them, he may dig up the soil and otherwise use and encumber it, doing no more injury than is necessary, when such course is indispensable to the enjoyment of the easement.'"

[16] The court's award is "for the purpose of constructing a dam in said River, near the head of said 'Diversion Ditch' or for the purpose of making any repairs," etc. We do not interpert this as being an unrestricted award to plaintiffs permitting them to construct a dam anywhere in the river they may desire, as appellant here seems to fear, but rather that plaintiffs are granted the right to maintain their dam near the head of the diversion ditch. A material change of location, of course, could not be made without the consent of the servient owner, absent a showing of prescriptive or other legal right thereto. 19 C.J., sec. 232, p. 982.

[17] With respect to the award to plaintiffs of the use of so much of defendant's lands on either side of their ditches as may be reasonably necessary for purposes of maintenance and repair, we find no fault. What is said above relative to the dam is equally applicable to the ditches. True, the amount allowed for such purposes is indefinite and uncertain. In the very nature of such an easement the extent thereof cannot be predetermined with certainty. It may be that portions of plaintiffs' ditches may never need attention other than casual inspection. Naturally, then, little or no land on either side of such portions will be needed for purposes of repair or otherwise. Other parts of the system may need constant attention and repair, in which event the secondary easement requirements of plaintiffs may be much greater. The court's judgment in that instance, as in all others, limits the use by plaintiffs to a reasonable amount of defendant's land. That the term "reasonable" is relative, we concede, but in each instance the amount used would constitute a question of fact, determination of which

reasonable usage had been abused. As before noted, action will lie for such abuse.

Omniscient or occult indeed would be the vision of the court that could foresee the precise amounts of land to be needed for repairs and maintenance along the ditches by plaintiffs in the future. Compare Neville v. Loudon Irrigating Canal, etc., 73 Colo. 548, 242 P. 1002. Had the award along either side of the ditches been of continuous strips of 10, 15, 20 or any other specific number of feet, the court might have been subject to the correction necessitated in Knudson v. Frost, 56 Colo. 530, 139 P. 533, 535, where the court in condemning such a specific award stated: "It will be seen from what has been said that the judgment of the court, whether based upon the oral agreement or upon such rights as follow the written grant, and as incident thereto, was erroneous in that it granted an absolute easement in two strips of land, each 20 feet wide and on either side of plaintiffs' ditch. This gives the plaintiffs the absolute right to the use of all this land at all times and whether necessary for the purpose or not, while for the purpose of repair they may require only the use of defendant's lands for the necessary distance on either side of plaintiffs' ditch in certain places and at certain times; yet it cannot be said that this is necessary on all parts of defendant's lands along the right of way, nor at all times. The right is based upon necessity, and the use is confined to the times, places, and extent necessary."

It should be noted that in contrast to Knudson v. Frost, supra, the court in the present case expressly limited plaintiffs' use of defendant's land on either side of the ditches to an amount "reasonably needed and required for the purposes of cleaning or inspecting said ditches, or making any repairs thereto necessary to the maintenance thereof." By that holding the court grounded its judgment on the very thing which the court in Knudson v. Frost deemed so essential, namely, the necessity of the case. No absolute amount is here granted, but only a reasonable amount which in turn is contingent upon the necessity of entering upon the land for the purposes of maintenance and repair.

In conclusion we repeat that in the very nature of plaintiffs' right to go upon defendant's lands, a secondary easement right for the purpose of obtaining full enjoyment of their primary easement consisting of their ditch right, including the dam in the river, they could not be foreclosed of a reasonable exercise of that privilege, nor successfully interfered with by injunction or otherwise in the absence of a showing of abuse of those rights.

We have considered all the specifications of error, but find no reversible error therein.

The judgment is affirmed.

JOHNSON, C. J., and ANGSTMAN, ANDERSON, and MORRIS, JJ., concur.

ADDENDUM "D"

defense to its action based upon breach of warranty. After having admitted that evidence, the trial court refused to give to the jury any instructions on the law in this state on contributory negligence and comparative negligence, even though the defendant submitted proposed instructions on that subject. Both the admission of such evidence and the refusal to give such instructions are Cambelt's major assignments of error on this appeal.

We now refuse to consider the propriety of the trial court's action, indulging in the presumption that the general verdict was reached by the jury on the ground that there was no construction contract between the parties, a defense to which the claimed errors do not pertain. As expressed in my dissenting opinion in *Barson v. Squibb, supra*, I would not follow such practice in our appellate review for the reasons discussed and based upon the authority cited therein.

For what little consolation it may be to Cambelt, if the jury strictly followed the instructions given them, any contributory negligence or fault of Cambelt should not have influenced their verdict. The instructions made it clear that if they found that Cambelt delivered plans and specifications to Dalton which were part of the agreement between them, and Dalton failed to follow them and thereby constructed a faulty and defective platform, they should return a verdict in favor of Cambelt. Contributory negligence or fault on the part of Cambelt was not mentioned as a factor they should consider.

Harry THORSEN, Plaintiff and Appellant,

v.

Markay JOHNSON, and Bryce Johnson, individually, and Markay Johnson and Bryce Johnson, dba Gooseberry Estates, a partnership, Defendants and Respondents.

GOOSEBERRY ESTATES, a partnership consisting of Tokaco Enterprises (itself a family partnership consisting of William T. Gardner and his children William Todd Gardner, Kari Ann Gardner, and Corrina Ann Gardner), Latigo, Inc., a corporation; Tell W. Gardner; Bryce Johnson; Markay Johnson and Leonard V. Elfervig, all dba Gooseberry Estates, a Utah Partnership, Plaintiffs and Respondents,

v.

Harry THORSEN and Donald Gates, Defendants and Appellants.

No. 18960.

Supreme Court of Utah.

Nov. 5, 1987.

Landowner brought action against downstream user for damages to proposed real estate development caused when downstream user dredged inactive irrigation ditch which coursed through development. The Sixth District Court, Sevier County, Don V. Tibbs, J., entered judgment in favor of owner. The downstream user appealed. The Supreme Court, Howe, J., held that: (1) evidence supported finding that downstream user exceeded and abused right to enter upon owner's land to clean ditch and that he was liable for damages, and (2) damages found were based upon erroneous measure.

Affirmed in part, and reversed and remanded in part.

Zimmerman, J., filed an opinion concurring in the result.

Durham, J., filed a concurring and dis-

1. Waters and Water Courses ⇐247(1)

Evidence supported finding that downstream user of irrigation water exceeded and abused his right to enter upon another's land to clean irrigation ditch and that he was thus liable for damages; dredging amounted to substantial widening and deepening of ditch whereby large number of trees were uprooted and excessive amount of earth and rocks excavated.

2. Damages ⇐138

Generally measure of damages for injury to real property is difference between value of property immediately before and immediately after injury.

3. Waters and Water Courses ⇐247(1)

Damages to proposed real estate development when downstream user dredged inactive irrigation ditch which coursed through development were arrived at based upon erroneous measure: there was no evidence supporting trial court's finding that lots had a fair market value of $6,000 before ditch was enlarged or that ditch totally destroyed land, and expert's appraisal was based on assumption that no one had lawful irrigation ditch easement through lots, which was an erroneous assumption.

Norman H. Jackson, Richfield, for appellants.

Ken Chamberlain, Richfield, for respondents.

HOWE, Justice:

This is an appeal from a judgment in favor of Gooseberry Estates, a partnership, against Harry Thorsen and Donald Gates (hereinafter Thorsen) for damages to a proposed real estate development in Sevier County caused when Thorsen dredged an inactive irrigation ditch which coursed through the development.

[1] Thorsen was a downstream user of the irrigation water and contended that he had the right to enter upon Gooseberry's property for the lawful purpose of cleaning the ditch. Gooseberry contended that the ditch had long been abandoned, that another ditch had been established in another location to carry Thorsen's water, and that he did the dredging for the sole purpose of preventing the use of Gooseberry's land for a planned subdivision to which he, as a nearby landowner, was opposed. The case was tried before the court without a jury, and the trial judge made a personal inspection of the property. In entering judgment in favor of Gooseberry, the trial court made findings of fact which are not clear as to whether the court found that the ditch had been abandoned prior to the dredging. However, at the oral argument of this case before this Court, counsel for Gooseberry admitted that the trial court did not find an abandonment and that Thorsen had an easement through Gooseberry's land for the ditch.

Nevertheless, in other findings of fact, the court found that the dredging by Thorsen greatly exceeded the mere cleaning of the ditch and amounted to a substantial widening and deepening of the ditch whereby a large number of trees were uprooted and an excessive amount of earth and rocks were excavated. Specifically, the court found that the ditch "should not have been cleaned or dug up in the manner that it was and if there had been any right at all it would have been merely the right of running a plow through the area, the right merely to handclean the ditch and it would have delivered more water under the circumstances than it will at the present time." The evidence fully supports the findings of fact and conclusions of the court that Thorsen exceeded and abused his right to enter upon Gooseberry's land to clean the ditch and that he is liable for damages.

[2, 3] Thorsen further contends that the damages found against him were excessive and based upon an erroneous measure. Although there are exceptions and variations,[1] generally the measure of damages

1. Another measure of damages, discussed in the dissent, is the cost of restoring the damaged 498 P.2d 648 (1972), we refused to employ that measure of damages where lilacs growing

for injury to real property is the difference between the value of the property immediately before and immediately after the injury (often referred to as the "Diminution in Value" rule). *Pehrson v. Saderup*, 28 Utah 2d 77, 498 P.2d 648 (1972); *Brereton v. Dixon*, 20 Utah 2d 64, 433 P.2d 3 (1967); 22 Am.Jur.2d *Damages* § 132. The trial court apparently endeavored to apply this measure of damages when it announced:

> The court finds that there were nine lots which were totally destroyed, and the court sets the value of $6,000 per lot and in its present condition and not being improved based upon the work up to that time; the plaintiffs are awarded a judgment of $54,000. That's based upon $6,000 per lot for the nine lots.

This analysis is flawed in two respects. There was no evidence that the "lots" had a fair market value of $6,000 before Thorsen enlarged the ditch, and there was no evidence that the ditch *totally destroyed* nine "lots." The following factual background is helpful to an understanding of why the trial court erred.

On May 14, 1979, Gooseberry entered into a contract with Bryce Johnson to purchase from him 94.47 acres of land for a total of $66,750 or $706.57 per acre. Johnson had acquired the 94.47 acres on July 30, 1978, for the same price. Gooseberry contemplated subdividing 50.59 acres of that tract into a development of thirty-three lots, containing 1.53 acres per lot.

During the seventeen months which elapsed from May 14, 1979, when Gooseberry purchased the land, to October of 1980, when Thorsen damaged the land, no improvements were placed upon the property by Gooseberry. A preliminary subdivision plat was prepared, but a final plat had not been approved or recorded. Gooseberry expended $8,400 for surveying, mapping, and platting. It also expended $7,100 in an attempt to drill a well to provide culinary water for the lots. Adequate water was not found. At the time of trial, Gooseberry still owed $16,000 on the purchase of the property. Gooseberry put on testimony that the projected cost of the improvements was $171,125, but this did not include a central sewage system which the county later required.

The $6,000-per-lot damage found by the lower court was apparently based on testimony given by an appraiser, Kenneth Esplin, that if and when the subdivision was approved and recorded, water was made available, and the improvements were in place, the lots should sell for $12,000 each. He opined that ten of the proposed lots were damaged so as to reduce their potential value by 50 percent, or to $6,000 each. Esplin admitted that he was not very familiar with the market for mountain lots in Sevier County where the property was located. He based his opinion on sales made in the Cedar City and Fairview areas in other counties. Counsel for Thorsen repeatedly objected to Esplin's testimony on the grounds that it was speculative, conjectural, and irrelevant.

The difficulty with Esplin's testimony, and the court's judgment which was based upon it, is that at the time Thorsen inflicted damage upon the realty, the property was in a pristine state exactly the same as when it had been purchased seventeen months earlier. It is true that Gooseberry had expended $15,500 *in preparations* to improve it with the expectation that some day it would become a subdivision of mountain lots. However, before this expectation could be realized, Gooseberry would have to finish paying for the land, develop a culinary water supply approved by the health department, and install a central sewage system. Then, county planning and zoning approval of the final plat, together with approval by the County Commission, would have to be granted. Thereafter, financing for hundreds of thousands of dollars worth of improvements would have to be obtained. When the improve-

that it would be unreasonable to there employ that measure, but recognized that it might be reasonable in a case where an ornamental tree

sonable since the value of an acre of similar land would be $1,250 and restoration costs

ments were in place, buyers who were ready and willing to pay $12,000 for each of the thirty-three lots would have to be found.

In viewing Gooseberry's land as a completed subdivision, Esplin and the trial court lost sight of the fact that the measure of damages is the diminution of the fair market value of the property immediately following the infliction of the damage—not what the property may be worth when and if substantial sums of money are expended to turn it into an improved subdivision. In *State v. Tedesco*, 4 Utah 2d 248, 291 P.2d 1028 (1956), a condemnation case in which the jury was instructed to find the fair market value of the property, we quoted with approval from *Pennsylvania S.V. R. Co. v. Cleary*, 125 Pa. 442, 17 A. 468 (1889).

> It is proper to inquire what the tract is worth, having in view the purposes for which it is best adapted, but it is the tract, and not the lots into which it might be divided, that is to be valued.... The jury are to value the tract of land and that only. They are not to determine how it could best be divided into building lots, nor conjecture how fast they could be sold, nor at what price per lot. A speculator or investor, in deciding what price he could afford to pay, would consider the chances and probabilities of the situation as then actually existing. A jury should do the same thing. They are not to inquire what a speculator might be able to realize out of a resale in the future, but what a present purchaser would be willing to pay for it in the condition it is now in.

More recently, the Supreme Court of Colorado in *Department of Highways v. Schulhoff*, 167 Colo. 72, 445 P.2d 402, 405 (1968), quoted the above passage from *Pennsylvania S.V.R. Co. v. Cleary* and restated the same rule as follows:

> It is proper to show that a particular tract of land is suitable and available for subdivision into lots and is valuable for that purpose. It is not proper, however, to show the number and value of lots as improper for the jury to consider an undeveloped tract of land as though a subdivision thereon is an accomplished fact. Such undeveloped property may not be valued on a per lot basis, the cost factor clearly being too speculative.

By fixing the damages based on a completed, improved subdivision, the trial court valued the land before it was damaged at $3,921 per acre, whereas it had been purchased seventeen months earlier at $706.57 per acre. This amounts to a 450 percent increase in value—without a single improvement to the realty. Significantly, appraiser Esplin testified that the remaining 43.88 acres of the 94.47 acres purchased by Gooseberry (which were not going to be subdivided) had a fair market value of $1,250 per acre. This was exactly the same value per acre ascribed to the entire 94.47-acre tract by Thorsen's appraiser, Joseph S. Stott. Stott belonged to a firm which had been marketing real estate in Sevier County for seven years. Mountain subdivision lots had been advertised for sale and listed with his agency. However, he testified, "in the years that I have been in the business, we have yet to sell a mountain lot out of our office."

Esplin's appraisal was also flawed because it was based on his assumption that no one had a lawful irrigation ditch easement through the "lots." This was erroneous. As previously mentioned, at oral argument of this case before this Court, counsel for Gooseberry Estates admitted that the trial court did not find an abandonment and that Thorsen had an easement for the irrigation ditch.

Additionally, while Esplin testified that the ditch as enlarged by Thorsen would reduce the potential value of any improved lot from $12,000 to $6,000, he did not testify that the value of any of the proposed lots was totally destroyed by the enlarged ditch. To the contrary, he testified the ditch diminished their potential value by 50 percent. Thus, there is no basis in the evidence for the trial court's conclusion that the value of the nine lots was totally

The remainder of the proposed 1.53-acre lots through which the ditch coursed was undamaged[2] and could be used at a minimum for grazing purposes. The entire ditch occupied 1.08 acres (3,150 ft. long × 15 ft. wide). This would be the maximum land which could have been "totally destroyed." It too assumes, contrary to the admission of Gooseberry's counsel, that Thorsen had no right at all to an easement.

Since the amount of damages found by the trial court was arrived at by an erroneous method, we reverse the judgment and remand the case to the trial court for reassessment of damages.

HALL, C.J., and STEWART, Associate C.J., concur.

ZIMMERMAN, Justice (concurring in the result):

I agree with Justice Durham's statement of the law of damages. However, I agree with the majority that the trial court made several unjustified assumptions in fixing the amount of damages. Therefore, I join the majority in remanding the case for a reassessment of damages. In making that reassessment, I would hold that the trial court should be guided by the broader damage principles discussed in Justice Durham's opinion.

DURHAM, Justice (concurring and dissenting):

I join the majority opinion in affirming the judgment as to liability, but dissent from its treatment of the damage question. The measure of damages for permanent injury to land and damage to trees was recently treated by the Utah Court of Appeals in *Ault v. Dubois*, 739 P.2d 1117 (Utah Ct.App.1987):

> Generally, the measure of damages for permanent injury to land is the difference in the market value of the land immediately before and immediately after the injury, but if the land may be restored to its original condition, the cost of restoration may be used as the measure of damages if it does not exceed the diminution in the market value.

Id. at 1120 (citations omitted). The opinion correctly notes that the above standard is not a rigid one and that "even when diminution in value is clearly the appropriate measure of damages, evidence as to repair costs is admissible for the purpose of helping [the fact finder] determine the loss of value." *Id.* at 1121 (citations omitted).

In *Brereton v. Dixon*, 20 Utah 2d 64, 433 P.2d 3 (1967), this Court endorsed a flexible rule particularly applicable for damages to land associated with destruction of trees on the realty.

> When property has been damaged or destroyed by a wrongful act the desired objective is to ascertain as accurately as possible the amount of money that will *fairly and adequately compensate the* owner for his loss.
>
> ....
>
> Because of the fact that any attempt at unvarying uniformity in applying either [the diminution in value rule or the separate value rule], a third rule, which we believe to be the better considered and more practical one, has been applied. It gives the injured party the benefit of whichever of the two rules will best serve the objective hereinabove stated of giving him reasonable and adequate compensation for his actual loss as related to his use of his property.... If he wants to maintain a fruit orchard, a wood lot, or even a primitive area, though his property may be more valuable if turned to an industrial or residential purpose, that should be his prerogative; and if it is wrongfully destroyed or damaged, the wrongdoer should pay for the actual damage he caused.

Id. at 66, 67–68, 433 P.2d at 5–6.

A few years later, in *Pehrson v. Saderup*, 28 Utah 2d 77, 498 P.2d 648 (1972), this Court quoted with approval the following language from *Thatcher v. Lane Construction Co.*, 21 Ohio App.2d 41, 254 N.E. 2d 703 (1970):

> Where the presence of trees is essential to the planned use of property for a homesite in accordance with the taste and wishes of its owner, where not unreasonable and where such trees are destroyed by trespassers, the owner may be awarded as damages the fair cost of restoring his land to a reasonable approximation of its former condition, if such restoration be practical, without necessary limitation to diminution in market value of such land.

28 Utah 2d at 79, 498 P.2d at 650 (citing *Thatcher*, 21 Ohio App.2d at 49, 254 N.E.2d at 708). The *Pehrson* opinion goes on to state what I believe to be a sound and just rule: "In a determination of the appropriate measure of damages in this area, the cardinal principles are flexibility of approach and full compensation to the owner, *within the overall limitation of reasonableness*." *Pehrson*, 28 Utah 2d at 79, 498 P.2d at 650.

The trial court in this case found as fact that defendant Thorsen "willfully and intentionally ... [made] a massive, senseless, purposeless ditch across [plaintiffs'] premises." A review of the numerous photographs in the record explains the finding that the trial judge, after personal inspection of the land, was "shocked at the damage which was done to the premises ... and [had] grave doubts whether or not the property ... can ever be used for the purposes for which they [sic] were bought by the Plaintiffs." The evidence showed that more than two hundred mature pine trees *and one hundred and seventy cedars over* eight feet tall were uprooted by defendant. Plaintiffs' experts testified that replacing them would cost approximately $275 per tree and that the trees on the lots were extremely important to the development and sale of the lots. Other testimony established that many lots would not even be saleable without grading and reseeding at a cost of $80,000 *without* replacing any trees. In short, although disputed, there was considerable evidence upon which the trial court could rely in awarding $54,000. In view of the malice that motivated this took in applying the diminution in value rule. In fact, I think he would have been justified in using the restoration costs, within some reasonable limit, as a measure of damages. Fifty-four thousand dollars, as compared to the cost of replacing the destroyed trees (more than $100,000) seems very reasonable to me. The majority's approach is, I believe, contrary to our case law supporting the principle of full compensation within the overall limitation of reasonableness.

Finally, I note that Utah Code Ann. § 78–38–3 (1987), upon which plaintiffs apparently did not rely, provides for the trebling of civil damages against "any person who cuts down ... or otherwise injures any tree ... on the land of another person ... without lawful authority."

Karla KISHPAUGH (Kornmayer), Plaintiff and Respondent,

v.

Richard Bruce KISHPAUGH, Defendant and Appellant.

No. 20423.

Supreme Court of Utah.

Nov. 6, 1987.

Natural father filed petition to modify divorce decree to change custody. Maternal grandparents filed petition to obtain guardianship over child. The Third District Court, Salt Lake County, Dean E. Conder, J., awarded custody to grandparents. Father appealed. The Supreme Court, Zimmerman, J., held that: (1) presumption favoring custody by natural parent was rebutted and trial court was permitted to base custody award solely on its determination of the child's best interests once it found that all three requirements for rebut-

ADDENDUM "E"

UNITED STATES of America,
Plaintiff,

v.

3.08 ACRES OF LAND, MORE OR LESS, Situated IN BOX ELDER COUNTY, Utah, Utah Power and Light Company, et al., and Unknown Others, Defendants.

No. C 129-61.

United States District Court
D. Utah, N. D.

Sept. 13, 1962.

Action by government to condemn a right of way for a canal across realty owned by utility company. The District Court, Christensen, J., held that right to maintain and operate a 50-foot boom on top of banks of the canal for cleaning canal was a part of the right of way easement reserved by operation of original grant of a right of way for construction of a canal by United States government over land and exercise of such right would not result in an additional taking which would have to be condemned.

Decree accordingly.

1. Waters and Water Courses ⇐222

Under Utah statute granting over all lands owned by the State a right of way for ditches constructed by the United States and requiring that all subsequent conveyances of State lands con... reservation of such right of way, ... ment had an existing right of ... establish and maintain a canal ... land which State had subsequently ... veyed under a patent stating that ... veyance was subject to any right ... which might have been established ... quired according to law and subject ... rights of way for ditches that had ... constructed by the United States. U.C.A. 1953, 65-2-3.

2. Public Lands ⇐114(1)

In construing effect of ... grant, the law in force at time ... is made controls.

3. Public Lands ⇐114(1)

The world at large is charg... notice of a conveyance and its limit... established by statute, and a provi... a patent directly contrary to ... law is void to the extent of such ...

4. Evidence ⇐5(2)

Court may take judicial not... canals in addition to having bottom ... sides frequently have banks.

5. Waters and Water Courses ⇐...

Construction and maintenan... eight-foot banks along canal were re... ably necessary to carry out authori... purposes of canal and were within sco... of easement that had been reserved f... construction of canal.

6. Eminent Domain ⇐93

Enlargement of easement cannot b... considered as causing mere consequenti... damage not incidental to an actual taki... for which no recovery can be had.

7. Eminent Domain ⇐2(10)
Waters and Water Courses ⇐222

Right to maintain and operate 50-foot boom on top of banks of can... for cleaning canal was a part of right o... way easement reserved by operation o... original grant of a right of way for co... struction of a canal by United State... government over land and exercise o... such right would not result in an add... tional taking which would have to b... condemned. U.C.A.1953, 65-2-3.

...ments ⇐50

...hile an easement holder may not ...e the servitude upon the grantor's ...rty by enlarging on the easement ...it is entitled to do what is reason... ...necessary for full and proper enjoy... ...of rights granted under the ease... ...in the normal development of the ... the dominant tenement.

...illiam T. Thurman, U. S. Atty., Craig ...incent, Asst. U. S. Atty., Salt Lake ... for plaintiff.

...rvin J. Bertoch, Sidney G. Baucom, ...Lake City, for defendants.

...RISTENSEN, District Judge.

...is is an action brought by the United ...s of America as plaintiff to condemn ...ht of way across a parcel of real ...rty owned by the defendant Utah ...r and Light Company for the pur... ...of constructing a canal.

...e use for which the real property ... be taken is stated in the complaint ... a public use in connection with the ...ruction, operation and maintenance ... Willard Canal, Weber Basin Proj... ...Utah. The estate to be taken accord... ...to the complaint is a right of way ... that canal and the right of way is described by metes and bounds as a strip of land 185 feet wide, containing 3.08 acres more or less, situated in Box Elder County, State of Utah. Subsequent proceedings have indicated that the Government believes that it is already entitled to the right of way sought to be condemned by virtue of a prior reservation, as will be discussed more fully hereafter. Actually it appears that the Government is seeking to condemn only any enlargement of the claimed existing easement that may be found to result from its contemplated use.

The plaintiff claims that the property in question was acquired by the State of Utah from the United States by a selection list transfer approved by the United States Department of the Interior on June 19, 1907; that said land was patented by the State of Utah to Charles W. Nibbley on May 2, 1917; that said land has by mesne conveyances become the property of the defendant Utah Power and Light Company; and that the plaintiff already has the granted and reserved right to construct a canal across said land without paying the defendant more than nominal compensation, estimated in the declaration of taking to be One Dollar.

The defendant Utah Power and Light Company does not contest the right of the plaintiff to condemn a right of way in the property in question but claims that it is entitled to fair and just compensation for the interest taken in the amount of $350.00 per acre for the 3.08 acres, or $1078.00, plus further compensation for damages to its remaining interest in the property taken and for consequential damage to the remaining portion of the parcel of land involved or to the entire generating or distributing system of which the property taken is an integrated part, in the amount of $18,900.00. The Power Company asserts that the parcel of land of which the condemned portion is a part was acquired by it for use as a site for towers to support high tension wires to be integrated with its generating and distributing system; that the towers had been designed and their construction was commenced prior to the taking by the government, but that due to the canal banks to be constructed on the condemned property and the boom necessarily to be used on those canal banks for maintenance of the canal, the Utah Power and Light Company has had to redesign its towers to increase their heights so that the power lines suspended between them and over the canal will be at a height required by law to avoid contact with plaintiff's equipment. It is alleged that the increased cost of the construction of the higher towers compared with those originally designed will amount to $11,900.00. It is further contended that the defendant Power Company will have to bear $7,000.00 as additional cost to strengthen a bridge which will accommodate the heavy equipment necessary to the defendant's operations, since direct

access by such heavy equipment without the strengthened bridge will be cut off by the proposed canal.

All of the other parties defendant have either disclaimed or defaulted. The following facts have been stipulated between the plaintiff and the Utah Power and Light Company:

The canal in question will have a maximum water gravity flow capacity of 950 cubic feet per second and a maximum flow capacity of 500 cubic feet per second with a bottom width of 30 feet and a maximum water surface width of 70 feet. It will be 90 feet wide inside the top of the embankments and will have an overall width from embankment toe to embankment toe of approximately 180 feet where it crosses the property of the Power Company. Drains and ditches will be constructed alongside the canal wherever necessary to carry off surface water. The earth embankments along the sides of the canal will have an average height of 8 feet above the average ground level of the said defendant's property. The fair market value of the interest in the land itself, as taken by the plaintiff in this action, is $350.00 per acre.

The sole contested issue of fact as reserved in the pre-trial order in the words of the parties is:

> "What is the amount of the consequential damage done to defendants' remaining interest in the property taken for the easement and to the remaining portion of the parcel of property out of which the easement is carved, or to the remainder of the integrated power system. To approach it another way, what is the amount of expense necessary to enable the defendant to make its remaining land and its remaining interest in the land taken usable to the extent and for the same purpose it was used or to be used prior to the taking. To express the measurement of damage in still a third alternative manner: Has the market value of the entire power system of the defendant been reduced in value by the taking, and if so, to what extent."

The parties expressed in the pre-trial order the contested issues of law, in addition to those implicit in the foregoing issue of fact, as:

> "(a) Whether or not plaintiff has the reserved right to construct the ditch known as the 'Weber Canal' across such real property with respect to any and all of the acreage classifications * * * by virtue of the laws of the State of Utah without paying defendant Utah Power and Light Company more than nominal compensation and
>
> "(b) Whether or not defendant Utah Power and Light Company is entitled to compensation for the alleged consequential damage, or cost of restoration, or reduction of market value, if you will, described above."

This case is perhaps the only contested civil case in recent years in which I have been persuaded by counsel not to hold an actual pre-trial conference. Counsel indicated a reluctance to go to the trouble of appearing in the Northern Division for the conference and indicated that the issues were simple and the evidence could be substantially stipulated. I therefore signed a stipulated "Pre-Trial Order" without holding an actual pre-trial conference. Developments have indicated that even in the seemingly simple cases, actual pre-trial conferences are beneficial and that rarely, if ever, can time be saved or the interest of justice promoted by dispensing with them.

Implicit in the pre-trial order is the indication that defendant Power Company did not contest the necessity for the "taking" and that the only issue of ultimate fact involved damages. Both parties, at the time the execution of the pre-trial order was under consideration and at the time of the trial, indicated that the damages to the Utah Power and Light Company were occasioned, aside from the value of any interest in land actually taken, by the eight foot banks of

the canal and by the plan and necessity of the government to operate from those banks a 50 foot boom for the purpose of cleaning the canal. This combination, the evidence established, necessitated the raising, as compared with their acceptable height, of the planned towers supporting the Power Company's transmission lines which would not be necessary were it not for the elevated banks and the necessary boom, and which raising entailed additional expense to the Power Company of $11,900.00.

The court finds in the latter connection that the defendant's increased cost of construction of electrical facilities necessitated by plaintiff's contemplated use of the land taken, including the utilization of the boom for maintenance of the canal, will be the sum of $11,900.00; that by reason of the establishment of the canal defendant's access to its remaining property by its necessary heavy equipment will be destroyed unless the said defendant incurs an additional cost of $7,000.00 in supporting a public bridge designed, without such support, for merely ordinary vehicular traffic; and that by these amounts the value of the defendant's integrated power system may fairly be regarded as depreciated by the taking. These findings will become important only if I am wrong in some or all of my other findings or conclusions.

Neither the pre-trial order nor the evidence adduced at the trial indicated what part of this expense or depreciation would be due to the maintenance of the elevated banks of the canal and what additional part, if any, would be attributable to the contemplated operation by the Government of the 50 foot boom in connection with the maintenance of the canal. While the Government itself accepted, during the course of the trial, the thesis that this proceeding was designed to assure to it the right to operate such boom and that it would be necessary for the Power Company to raise its transmission lines to permit such operation, there was no specification in the pre-trial order, nor in notice of taking, that this operation was included as among the rights sought to be condemned or confirmed in the Government. The significance of this refinement became apparent only from the briefs filed following the trial, which briefs changed the original emphasis upon the question of whether the Government already had a right of way for the maintenance of a canal across plaintiff's land to one of whether, even though some right of way existed, it included the right to maintain eight foot banks along the canal and the use of the boom in connection with the maintenance of the canal.

The Government now maintains that the question of the enlargement of a right was not involved in the issues reserved in the pre-trial order and thus should not be considered while the defendant Power Company points out that the question of enlargement directly relates to the amount of damages to which the Power Company is entitled within the purview of the question of damages expressly reserved in the pre-trial order. I must observe, too, that the government hardly can contend that this is only a suit for a declaration that whatever rights it seeks are included in an existing reserved right of way when it has seen fit not simply to ask for such a declaration, but to ask that any and all interests of the defendant Power Company in the land described be condemned for the purpose of permitting the Government to establish and maintain the canal by means of all necessary structures and equipment.

[1] In 1905 the Legislature of the State of Utah enacted the following statute, now 65–2–3 Utah Code Annotated 1953, which reads as follows:

> "There is hereby granted over all lands now or hereafter belonging to the state of Utah a right of way for ditches, tunnels, telephone and transmission lines, constructed by authority of the United States. All conveyances of state lands hereafter made shall contain a reservation of such right of way."

In 1907, after the enactment of this statute, the State of Utah acquired the

land in question from the United States Government. In 1917 it was sold by the State under patent to George W. Nibbley. The grant in the patent contained the following provision:

> "Subject to any easement or right of way as may have been established or acquired according to law, over the same or any part thereof and subject also to all rights of way for ditches, tunnels and telephone and transmission lines that may have been constructed by authority of the United States."

The defendant contended at the time of the trial that the effect of the patent was to limit the reserved right of way to easements established and perfected while title to the property was still in the State. There seems little doubt that if the wording of the patent is accepted at face value this might be the effect. The defendant further contended that independent of the wording of the patent itself, the State statute would have the same effect. On the latter point it cited United States v. Pruden, 172 F.2d 503 (10 Cir. 1949), interpreting a similar Oklahoma statute.

Recognizing the significant difference between the wording of the patent and the statute, and in harmony with the views I expressed at the trial, I am of the opinion that not the Pruden case but Ide v. United States, 263 U.S. 497, 44 S.Ct. 182, 68 L.Ed. 407 (1924) controls the resolution of this question for the following reasons: The Pruden decision was an interpretation of the Oklahoma statute which was in part at least based upon Oklahoma decisions of which there are no counterparts among the Utah adjudications. But more important, primary reliance was placed in Pruden upon the interpretation of the Federal statute governing the reservation of rights of way for highway purposes, whereas, as pointed out in Ide, there is a directly analogous Federal statute dealing with canals, on the very language of which the Utah statute is based, and which Ide interprets directly contrary to the conclusion reached in Pruden.

I see no escape from the controlling effect of the Ide doctrine which interpreted the very statute which Utah used as the model for its own statute with reference to the reservation of a right of way for canals. See also Northern Pacific Railway Company v. United States, 277 F.2d 615 (10 Cir. 1960); Green v. Willhite, 160 F. 755 (Cir.C.D.Idaho 1906); United States v. Anderson, 109 F.Supp. 755 (D.C.E.D.Wash.1953); United States v. Fuller, 20 F.Supp. 839 (D.C.Idaho 1937); Dopps v. Alderman, 12 Wash.2d 268, 121 P.2d 388 (1942).

Nor does the fact that the patent in question uses language indicating a different interpretation change the effect of the statute, whether this circumstance be looked upon as one relating to the legislative history of the statute to be looked to in its interpretation or as an argument that the form of the patent could override the law itself. On the former subject, the evidence indicated that while this particular form of the patent was utilized in 1917, thereafter the State Land Board changed the form of similar patents to conform to the wording of the statute rather than to indicate that the right of way reserved applied only to canals that had been constructed theretofore. It is more reasonable to suppose that the Land Board discovered the invalidity of the wording of the patent in question and changed other patents to conform with the controlling law than to suppose that the Legislature of the State of Utah by failing to pass a law correcting the form of the patent in question put its implied stamp of approval upon the interpretation of the Land Board. In view of this evidence the case of State v. Hatch, 9 Utah 2d 288, 342 P.2d 1103 (1959), so strongly relied upon by the Power Company loses point.

[2, 3] In any event, it is well settled that in construing the effect of a public grant such as a patent the law in force at the time the grant is made controls. The world at large is charged with notice of a conveyance and its limitations established by a statute, and a provision in a patent directly contrary to governing law

is void to the extent of such conflict. Gleason v. White, 199 U.S. 54, 25 S.Ct. 782, 50 L.Ed. 87 (1905); Morris v. United States, 174 U.S. 196, 19 S.Ct. 649, 43 L.Ed. 946 (1899); Burfenning v. Chicago St. P. M. & O. Ry. Co., 163 U.S. 321, 16 S.Ct. 1018, 41 L.Ed. 175 (1896); Knight v. United Land Ass'n., 142 U.S. 161, 12 S.Ct. 258, 35 L.Ed. 974 (1891); Iron Silver Min. Co. v. Campbell, 135 U.S. 286, 10 S.Ct. 765, 34 L.Ed. 155 (1890); Glasgow v. Baker, 128 U.S. 560, 9 S.Ct. 154, 32 L.Ed. 513 (1888); Coffee v. Groover, 123 U.S. 1, 8 S.Ct. 1, 31 L.Ed. 61 (1887); United States v. Stone, 2 Wall. 525, 69 U.S. 525, 17 L.Ed. 765 (1865); Stoddard v. Chambers, 2 How. 284, 43 U.S. 284, 11 L.Ed. 269 (1844); The Mayor, etc. of New Orleans v. De Armas and Cucullo, 9 Pet. 224, 11 Curt. 338, 34 U.S. 224, 9 L.Ed. 109 (1835); Polk's Lessee v. Wendal, 9 Cranch 87, 13 U.S. 87, 3 L.Ed. 665 (1815); United States v. State of Washington, 233 F.2d 811 (9 Cir. 1956). See also Burke v. Southern P. R. Co. 234 U.S. 669, 34 S.Ct. 907, 58 L.Ed. 1527 (1914); United States v. Fuller, 20 F.Supp. 839 (D.C. Idaho, 1937); Walpole v. State Board of Land Com'rs., 62 Colo. 554, 163 P. 848 (1917).

I conclude that the Government without reference to the condemnation proceedings had, and has, an existing right of way to establish and maintain the canal in question together with all appurtenances reasonably necessary for such canals.

This brings us to the point which was not defined in the pre-trial order but which lurks within the issues specified and which now has been urged by the defendant Power Company, i. e. that even though a right of way for the maintenance of a canal exists, the elevation of the banks to eight feet and the maintenance and operation of the boom necessitating the raising of the transmission lines of the Power Company constitute an enlargement of that right, which enlargement must be condemned and for which compensation must be paid.

[4, 5] I think it is a matter of common knowledge of which the court may take judicial notice, that canals in addition to bottoms and sides frequently, if not invariably, have banks. It is reasonable to suppose that the Legislature in making provision for a reservation of rights of way for canals contemplated that the easement so reserved would be for the purpose of constructing and maintaining banks of canals, among other things. In this mountainous region where hydraulic gradient must be maintained over irregular terrain it may not be supposed that the maintenance of canals without banks necessarily was contemplated. On the contrary, not only may banks of some sort be deemed reasonably necessary to the enjoyment of the easement reserved in favor of the Government, but we must accept them as within the contemplation of the statutes reserving the easement.

If the easement reserved includes the right to maintain canal banks, I cannot find that their construction and maintenance to a maximum of eight feet above the natural terrain in the area in question would be unreasonable. If banks can be maintained above the natural terrain to any degree within the contemplation of the easement, I would think that they could be maintained to the above extent, depending upon the reasonable necessities as determined by reclamation officials. The pre-trial stipulation and order accept the necessity for the contemplated construction, including the banks. There is no evidence or agreements from which I could find that the construction and maintenance of the eight foot banks are beyond the scope of the easement, and I find that they are reasonably necessary to carry out the authorized purposes of the canal.

Whether the same can be said about the right to maintain and operate a fifty foot boom on the top of the banks is a more difficult question. But before dealing further with this question two preliminary points raised by the Government should be considered.

Consideration of the issue of enlargement of the heretofore reserved right of way is not precluded by the pre-trial order. While the matter of enlargement was not specifically mentioned at the trial the pre-trial order stipulated by the parties did reserve the question of damages for any taking. The defendant would not be precluded from rightfully claiming damages for a portion of the interest actually taken although it had asserted without warrant a right to recover damages for the whole. If the construction of the canal with ordinary banks and appurtenances would not amount to a taking, the maintenance and operation of the fifty foot boom might; and, if it did, the question of damages for the taking of an easement to operate the boom would be within the purview of the pre-trial order. The very fact that this case started out and still continues on the face of the complaint as a pure and simple action to condemn a right of way without reference to any prior rights now claimed by the Government does not put the latter in a very good position now to be technical in excluding from consideration a resolution of all of the issues necessarily implied by the subsequent positions of each party as acquiesced in by the other.

[6] Nor do I think the position of the Government is correct that damages otherwise recoverable for an easement to operate the boom would amount merely to consequential damages for which the defendant Power Company could not recover for the latter reason. It is true that a firm Federal rule denies recovery of consequential damages unless they are incidental to an actual taking. United States v. Willow River Power Co., 324 U.S. 499, 65 S.Ct. 761, 89 L.Ed. 1101 (1945); Northern Trans. Co. v. Chicago, 99 U.S. 635, 25 L.Ed. 336 (1879); Batten et al. v. United States, 306 F.2d 580 (10 Cir. 1962); Harris v. United States, 205 F.2d 765 (10 Cir. 1953). Apart from the question of whether there already exists a right of way in favor of the Government for the purpose, the very statement of the rule and the latest expression of our Circuit Court in the Batten case make clear that the claimed enlargement could not be considered as causing more consequential damage not incidental to an actual taking. In Batten, recovery was denied because there was not a physical invasion of the air space over the claimant's land and no related taking in the view of the majority of the court, but over the dissent of Judge Murrah. Compare United States v. Causby, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946), where there was an actual invasion of the air space above the claimant's land by low flying aircraft and, hence, a compensable taking and a recovery of consequential damages.

[7] If it does not already have that right, the Government really is asking now for an easement to make an extraordinary use of the air space above the canal for the operation of the fifty foot boom. This in substance was the statement that the Government attorney confirmed at the last hearing. If it needed an easement I suppose that no one would assert that the Government should not pay for it. It would seem to make no difference in principle that the additional easement sought to be obtained extends vertically above the banks of the canal if indeed it is an additional easement that must be condemned. But is it?

There is a suggestion in the evidence that there may be new types of equipment which could be constructed and operated without entailing the necessity of raising the defendants' lines or that dredging equipment might be employed. The preponderance of the evidence, however, indicates, and I find, that upon the basis of equipment in existence the only practical way that the canal can be cleaned at present, and certainly the normal and reasonable means under current conditions, is to utilize a fifty foot boom with dragline, the banks of the canal at the water line being some seventy to ninety feet apart, and it being impracticable because of the construction of the canal and the necessity of maintaining water in it almost all of the time to move equipment into the bottom.

I further find for completion of the record in the event of appeal that in order to construct its transmission lines at a height sufficient to permit the operation of such a boom the defendant necessarily will incur expenses of $8707.00 more than would be necessary if the transmission lines were elevated and constructed to adjust simply to the extra height of the eight foot banks with requisite safety margin. Such finding, however, is not essential to a disposition of the case if my decision stands.

Not without some doubt, I have concluded, and find, that right to maintain such a canal in this ordinary and reasonable fashion, including the operation of the fifty foot boom under existing conditions, is a part of the right and easement reserved by operation of the original grant and subsequent conveyances and the reservation incorporated therein under the law.

It must be acknowledged that at the time of the original reservation such equipment as a fifty foot boom and dragline for the purpose of cleaning canals was not a usual thing, and may not even have been in use at all. Such an operation was not one that could be deemed uncontemplated in principle. As a matter of fact, a one hundred foot wide canal probably was not ordinary construction in those days. It probably was not contemplated that such a canal as the one in question here would run water both ways—in the summer by means of pumping from the canal and during the non-irrigation seasons into the canal. But if we must limit construction or maintenance within the protection of the easement to exactly what was well known or practiced then, the basically continuing purpose of the reservation would be frustrated.

[8] The right reasonably to maintain such a canal, including the right to operate the fifty foot boom if reasonably necessary under existing conditions, must be considered to be included in the reserved easement. The general rule is that while an easement holder may not increase the servitude upon the grantor's property by enlarging on the easement itself, it is entitled to do what is reasonably necessary for full and proper enjoyment of the rights granted under the easement in the normal development of the use of the dominant tenement. Kogod v. Cogito, 91 U.S.App.D.C. 284, 200 F.2d 743 (1952); Pitsenbarger v. Northern Natural Gas Co., 198 F.Supp. 665 (D.C.S.D.Iowa 1961); Williams v. Northern Natural Gas Company, 136 F. Supp. 514, (D.C.N.D.Iowa 1955) App. Dis., 8 Cir., 235 F.2d 782; Laden v. Atkeson, 112 Mont. 302, 116 P.2d 881 (1941); Holm v. Davis, 41 Utah 200, 125 P. 403, 44 L.R.A.,N.S., 89 (1912); 17A Am.Jur. Easements § 129 pp. 737–739; 5 Restatement, Property, § 484 (1944) p. 3020; cf. Stalcup v. Cameron Ditch Company, 130 Mont. 294, 300 P.2d 511 (1956).

The last line of inquiry at the last hearing, which was not discussed in counsels' statements, presents a final problem that at least must be noted. In response to a question by the court, a witness for the Government testified that the canal in his judgment would have to be cleaned about every ten years. Assuming that construction is not now complete, then, it may be more than ten years before there will be any occasion to use the boom. While I have found with some assurance that the use of that boom would be reasonably necessary to clean the canal if it had to be cleaned under existing conditions, what the situation will be ten or fifteen years hence in view of the prospective changes in equipment and procedures as suggested by the evidence is somewhat uncertain.

The Government insists that it need not pay for any additional right to operate the boom. If it thus relies exclusively upon the existing easement, rather than condemnation, it is under continuing obligation to avoid unnecessary injury to the servient estate. Brown & Root, Inc. v. United States, 116 F.Supp. 732, 126 Ct.Cl. 684 (1953); Laden v. Atkison, 112 Mont. 302, 116 P.2d 881

(1941); Holm v. Davis, 41 Utah 200, 125 P. 403, 44 L.R.A.,N.S., 89 (1912); 17A Am.Jur. Easements § 130 p. 739. And it is entirely possible that the use of the boom ten or fifteen years hence will needlessly inflict injury upon the Power Company.

Should I accede to the Government's insistence that I recognize its claimed rights without making an award on the theory that an additional easement to operate the boom is sought, it necessarily would be, it seems, the confirmation of the right to operate the boom under existing conditions, not precluding a later claim under changed conditions that its operation then would be the subjugation of the servient estate to unnecessary injury and thus an enlargement of the existing easement. On the other hand, the dilemma of the Power Company too is perplexing for it must determine the height of its lines in the near future to permit early installation; and if it does not adjust its construction program to the possibility that the operation of the boom in the future will continue a reasonably necessary exercise of the existing easement of the Government, it will be proceeding at its peril.

Having already permitted the parties to reopen once, I fear that there still is insufficient evidence, or even specific issues reflected in the pleadings or pretrial order before me, to make possible a solution of this refined dilemma. It may be that by their respective positions, and the implied issues acquiesced in, the parties may be confronted unavoidably with the problem as a part of the practical context of the case. Perhaps it is one of those inbuilt possibilities that should be disregarded by me as the parties have chosen to disregard it in their prior submissions. And perhaps it commends, as I endeavored to suggest in exploring the possibilities of some practical adjustment at the last hearing, further thoughts and efforts toward a practical solution between the parties.

The foregoing opinion, together with the recitation of uncontroverted facts set out in the pre-trial order submitted by the parties, is deemed sufficient as findings of fact and conclusions of law. In view of the situation last mentioned, however, it is directed that a form of proposed decree not inconsistent with this opinion be prepared by counsel for the Government, and, if the form is not agreed to by the parties, settled upon at least five days notice on one of my regular rule days.